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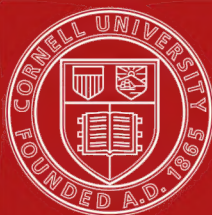
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A TREATISE  
ON THE  
LAW OF NEGLIGENCE.

BY  
THOMAS G. SHEARMAN  
AND  
AMASA A. REDFIELD.

SECOND EDITION.

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## PREFACE TO THE SECOND EDITION.

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THE authors gratefully acknowledge the kind appreciation of their professional brethren, in exhausting, within less than eight months, the entire edition of this book. They have endeavored to merit a continuance of this favor, by the scrupulous care with which the present edition has been revised, notwithstanding the pressure of other affairs has made the labor more difficult than ever.

No change has been made in the general plan of the work: not because the authors would have hesitated to recast it, if it had been desirable to do so, but because the arrangement has met with almost unanimous approval, and because, after renewed study, and careful consideration of the one or two objections which have been made, the authors could see no practicable way of improving it.

Believing, however, that a few readers have failed to perceive the principle of arrangement upon which the book was constructed, the authors have given in this edition an analysis, showing the reasons for grouping together the various subjects in the order adopted.

The amount of new matter in the present edition is far greater than is indicated by the increased number of pages. Many of the notes have been condensed to make

room for new cases. But nothing has been omitted which could possibly diminish the value of the book, while not only the new decisions, but some which were by oversight left out of the former edition, will be found in this.

The assistance of R. BACH McMASTER, Esq., upon the notes and index of this edition, merits our renewed and cordial acknowledgment.

NEW YORK, September 1, 1870.



## PREFACE TO THE FIRST EDITION.

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THIS TREATISE may fairly claim to be considered a pioneer in its peculiar field. Its authors are not aware of more than one book that is professedly devoted to the same subject; and that, although a useful compilation of reported decisions, is not, and does not pretend to be, a treatise, and is made up exclusively from the Scotch and English reports. One or two treatises on the Law of Torts devote considerable space to the subject of Negligence; but a very brief examination will satisfy any one that those works have afforded no material aid to the preparation of this. The newness of the field is not mentioned as a merit of the book, so much as an excuse for its defects. A law book can be much better written upon the foundation of several preceding works on the same subject, than when its authors have little or nothing to guide them in their labors. And this, with the fact that the book has been prepared in the brief intervals of an active and engrossing practice, amid constant interruption, and in hours which ought to have been given to rest, is all the apology which will be here made for the many defects of this book: defects of which no one can be half so conscious as the authors themselves.

The original plan of the work was to include all the law relating to negligence considered as a wrong, independent of contract, and nothing else. And if it were possible for the authors to write treatises upon other branches of the law, so as to have supplied elsewhere all that would have been missed by the profession, had this plan been adopted, they would have adhered to it. But it became manifest that, in the present chaotic state of legal literature, a strict adherence to this plan would not only have disappointed the profession, but would have left them without any information concerning American law upon several important branches, except such as might be obtained from digests, or from scarce and old treatises. Accordingly, the scope of the work has been in some respects enlarged, while the rules of navi-

gation, which are always dealt with in treatises on Shipping, are omitted from this volume. The responsibility of carriers of passengers has been fully discussed, because they are liable only for negligence ; while carriers of goods, being liable as insurers, unless protected by special contract, have not been considered within the classes affected by the law of negligence. The rule of damages applicable to cases of negligence has been stated at some length, because it is not set forth in any one place in treatises on Damages, in entire harmony with the doctrines upon which this work has been based. The day will come, it is to be hoped, in which treatises expository of the common law will be arranged in strict logical order, each confining itself to, and exhausting, its appropriate subject ; but that day has not yet arrived, and cannot arrive, until some new Pothier shall arise, and do for America and England what the first Pothier did for France. Meanwhile, it may be that this volume, by approximating to the ideal standard of method more nearly than some other works, will contribute somewhat to this desirable consummation.

The authors acknowledge with pleasure the valuable aid which they have received from R. BACH McMASTER, Esq., in the preparation of many of the notes.

NEW YORK, September, 1869.

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# THE LAW OF NEGLIGENCE.

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PART I. GENERAL PRINCIPLES.

II. WHO MAY BE LIABLE FOR NEGLIGENCE,  
AND TO WHOM.

III. PARTICULAR CASES OF NEGLIGENCE.

IV. MEASURE OF DAMAGES.



# PART I.

## GENERAL PRINCIPLES.

### CHAPTER I. NEGLIGENCE IN GENERAL.

#### II. DEGREES OF NEGLIGENCE.

#### III. CONTRIBUTORY NEGLIGENCE.

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## CHAPTER I.

### NEGLIGENCE IN GENERAL.

- SEC. 1. Negligence distinguished.
2. Negligence defined.
  3. Distinction between negligence and fraud.
  4. Negligence under contract or other obligations.
  5. Inevitable accident.
  6. Negligence, when not culpable.
  7. Culpable negligence defined.
  8. Negligence not actionable unless injurious.
  9. Negligence must be proximate cause of injury.
  10. What negligence deemed proximate.
  11. Negligence a question of mingled law and fact.
  12. Negligence to be proved by party charging it.
  13. What will suffice to shift the burden of proof.
  - 13 *a*. Violation of law, evidence of negligence.
  14. Owner not bound to rely on contract.
  15. Liability not shifted by contract.

§ 1. Negligence is a word sufficiently broad to include almost every breach of duty, not clearly intentional. Thus, a man is said to neglect to pay his debts,<sup>1</sup> to neglect to perform his contracts, and so forth; and, if the word should be used in this sense, our subject would cover the

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<sup>1</sup> In the old forms of declarations in debt or assumpsit, it was commonly averred that the defendant *neglected* and refused to pay.

whole field of contracts. This is not, however, the proper meaning of the term in law.

§ 2. Negligence, in correct legal phraseology, is more nearly synonymous with carelessness than with any other word. It signifies, primarily, the want of care, caution,<sup>1</sup> attention, diligence, skill, or discretion, in the performance of an act, by one having no positive intention to injure<sup>2</sup> the person complaining thereof.<sup>3</sup> Where such an intention exists, the act ceases to be merely negligent, and becomes one of violence or fraud. The secondary meaning of "negligence" includes every omission to perform a duty imposed by law for the avoidance of injury to persons or property.

§ 3. There is, necessarily, a marked distinction between negligence and fraud. Sir William Jones, in his celebrated treatise on Bailments, somewhat confounded the two, speaking of gross negligence as equivalent to fraud. But this is a misuse of terms. If it is meant that the effects of such negligence are as prejudicial as those of positive fraud, that is a point of no importance, since the most trivial negligence may be attended with the same results.

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<sup>1</sup> "Negligence is a violation of the obligation which enjoins care and caution in what we do" (*Tonawanda R. Co. v. Munger*, 5 Denio, 255, 267).

<sup>2</sup> "In negligence, whatever may be its grade, there is no purpose to do a wrongful act, or to omit the performance of a duty. There is, however, an absence of proper attention, care, or skill. It is strictly nonfeasance, not malfeasance. This is the general idea, and it marks the distinction between negligence and fraud. In the first, there is no positive intention to do a wrongful act; but, in the latter, a wrongful act is ever designed and intended. Negligence, in its various degrees, ranges between pure accident and actual fraud, the latter commencing where negligence ends. Negligence is evidence of fraud, but still is not fraud" (*Gardner v. Heartt*, 3 Denio, 232, 236). "Negligence, even when gross, is but an omission of duty" (*Tonawanda R. Co. v. Munger*, 5 Denio, 255, 267). Of course the fact that the injury was unintentional is no excuse (*Amick v. O'Hara*, 6 Blackf. 258), even though the act be in itself lawful (*Tally v. Ayres*, 3 Sneed, 677).

<sup>3</sup> This limitation is necessary; because A. might, intending only to injure B., actually injure C. As against B., the act would be a willful wrong, but as against C., it would be simply negligence.

If it is meant that the motive is as bad, that is an assertion which cannot be sustained, without confining the remedy for gross negligence to a very limited class of cases ; since, if it is once fully understood that the proof required to support an allegation of gross negligence is equal to that required to establish fraud, juries will hesitate long before affixing such a stigma upon men who have evidently meant no wrong, although exceedingly careless. In this view, most of the latest authorities concur.<sup>1</sup>

§ 4. Negligence may consist either in the careless performance of obligations assumed by contract, or in neglect to undertake the performance of obligations imposed by law. The latter obligations may be divided into those which impose specific duties upon particular individuals, and those which are of general application. The former class are often treated as implied contracts, and a breach thereof may be regarded practically as a breach of contract ; but the breach of any of those obligations which the law imposes upon all persons, without regard to their special relations to one another, is a pure tort. Negligence, in respect to obligations imposed by law, is therefore called tortious negligence, though it may not always be exclusively tortious : there being cases in which the injured party may sue either on the implied contract, or on the tort, at his election.

§ 5. The mere fact of an injury having been suffered

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<sup>1</sup> Thus, in the decisions arising upon negotiable paper, it is said that although gross negligence may be evidence of bad faith, it is not the same thing (*Goodman v. Harvey*, 4 Ad. & El. 870 ; *Uther v. Rich*, 10 Id. 784 ; *Carlton v. Ireland*, 5 El. & B. 765). And this remark is quoted with approval in other cases (*Hall v. Wilson*, 16 Barb. 548 ; *Steinhart v. Boker*, 34 Barb. 436 ; *Jones v. Smith*, 1 Hare, 71). In cases arising upon other questions, the same rule is adhered to (*Gardner v. Heartt*, 3 Denio, 232 ; *Lincoln v. Buckmaster*, 32 Verm. 652 ; *Wilson v. Y. & M. R. Co.*, 11 Gill & J. 58, 79 ; see *Tonawanda R. Co. v. Munger*, 5 Denio, 255). But in *St. Louis &c. R. Co. v. Todd* (36 Ill. 409), the court defined gross negligence as "amounting to willful injury."

is not enough to establish a charge of negligence against the person causing the injury. No one is responsible for an injury caused purely by inevitable accident, while he is engaged in a lawful business,<sup>1</sup> even though the injury was the direct consequence of his own act, and the injured party was at the time lawfully employed, and in all respects free from fault. But in order to prove that an accident was inevitable, it is not always enough to show that, under the circumstances existing at the time, it could not be avoided. It must also appear that the defendant was not in fault in bringing about any of those circumstances.<sup>2</sup> For if, by culpable negligence, he brought himself or his property into circumstances of such difficulty or peril as to make it impossible for him to escape from them without injuring his neighbor, he cannot excuse himself by showing that he would have done more injury if he had left himself

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<sup>1</sup> *Wakeman v. Robinson*, 1 Bing. 213; *Dygert v. Bradley*, 8 Wend. 473; *Harvey v. Dunlop, Hill & Denio*, Supp. 193; *Calkins v. Barger*, 44 Barb. 424; *Aldridge v. Great Western R. Co.*, 3 Man. & G. 515; *McGrew v. Stone*, 53 Penn. St. 436; *Boland v. Missouri R. Co.*, 36 Mo. 484; *Garris v. Portsmouth &c. R. Co.*, 2 Ired. [N. C.] Law, 324; *Harding v. Fahey*, 1 Greene, 377; *Davis v. Saunders*, 2 Chitt. 639; see *Goodman v. Taylor*, 5 Carr. & P. 410; *Center v. Finney*, 17 Barb. 94. Where an injury was caused by the slipping of the defendant's horse, from circumstances which he could not control, he was held not liable (*Morgan v. Symonds*, 1 Jur. 137). Where the defendant, in endeavoring to separate his dog from another with which it was fighting, accidentally struck the owner of the latter dog, it was held that his object was a lawful one, and that he was not liable for his accidental blow (*Brown v. Kendall*, 6 Cush. 292). Where one builds a milldam on a proper model, and the work is faithfully done, he is not liable to an action, though it breaks, and his neighbor's dam and mill below are thereby destroyed (*Livingston v. Adams*, 8 Cow. 175).

<sup>2</sup> Thus, one who drives a carriage is not absolved from blame for an accident, though he should use his utmost care at the time to avoid it, if the defective condition of his reins prevented his doing so; for he is bound to have good reins (*Cotterill v. Starkey*, 8 Carr. & P. 691). In an action against the owner of a steamboat, to recover the value of a span of horses which were lost while being transported from Albany to New York, by the sinking of the vessel in the Hudson River, it appeared that the immediate cause of the accident and loss was the contact of the steamboat with the mast of a sloop which had been sunk in a squall two days before, which mast was out of water fifteen or sixteen feet at low water, and was visible the day before and the same day of the accident,—Held, that the loss was not occasioned by an inevitable accident, or act of God, within the meaning of the terms as used in the law, but might have been avoided (*Merritt v. Earle*, 29 N. Y. 115).

or his property where it was. His original fault deprives him of the right to plead inevitable accident.

§ 6. Negligence is not always necessarily culpable. There are many cases in which it might be desirable that a greater degree of care should be used than the law requires; but it is only the lack of such care or diligence as the law demands which constitutes culpable negligence.<sup>1</sup> And the law makes no unreasonable demands. It does not require from any man superhuman wisdom or foresight. Therefore no one is guilty of culpable negligence by reason of failing to take precautions which no other man would be likely to take under the same circumstances. If one uses every precaution which the present state of science affords,<sup>2</sup> and which a reasonable man would use under the circumstances, he is not held responsible for omitting other precautions which are conceivable, even though, if he had used them, the injury would certainly have been avoided.<sup>3</sup> So if he uses all the skill and diligence which

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<sup>1</sup> *Dygart v. Bradley*, 8 Wend. 469. Thus, where a stone was thrown, which hit plaintiff's daughter in the eye, but it did not appear to have been done negligently, the defendant was held not liable. Yet it was obvious that there must have been some negligence (*Harvey v. Dunlop*, Hill & D. Supp. 193). So, where one driving a wagon on the highway, with all due care, ran over a child whom he did not see, and could not reasonably be expected to see (*Hartfield v. Roper*, 21 Wend. 615). One who is hunting in a wilderness is not bound to anticipate the presence, within range of his shot, of another man; and is not, therefore, liable for an injury caused unintentionally by him to a person of whose presence he was not aware (*Bizzell v. Booker*, 16 Ark. 308).

<sup>2</sup> Thus, a railroad company is not liable for injuries caused by sparks from its locomotives, when it has used all the means known to science to extinguish them, and kept a reasonable watch upon the track, even though it might have prevented the mischief by keeping an army of men to watch the track and put out the sparks (*Rood v. N. Y. & Erie R. Co.*, 18 Barb. 80; *Vaughan v. Taff Vale R. Co.*, 5 Hurlst. & N. 679; reversing S. C., 3 Id. 743; *Phila. & Reading R. Co. v. Yeiser*, 8 Penn. St. 366).

<sup>3</sup> Where a water-supplying company had constructed its works upon the best known system, and kept them in good order for twenty-five years, at the end of which time a frost of unprecedented severity caused the pipes to burst, it was held that the company was not liable for injuries caused thereby (*Blyth v. Birmingham Waterworks Co.*, 11 Exch. 781).

can be attained by reasonable means, he is not responsible for failure.<sup>1</sup>

§ 7. In determining what constitutes negligence, regard is to be had to the growth of science, and the improvement in the arts, which take place from generation to generation; and many acts or omissions are now evidence of gross carelessness, which a few years ago would not have been culpable at all, as many acts are now consistent with great care and skill, which in a few years will be considered the height of imprudence. Thus, the introduction of the steam engine has made it necessary that more care should often be used in the management of horses than was formerly necessary; the invention of the safety lamp made it a careless act to enter a bituminous coal mine with an open candle; and the invention of improved tools, machinery, and modes of working, has made it negligent to use old-fashioned and more dangerous ones.<sup>2</sup> It is not an essential element of culpable negligence that the defendant should have anticipated, or have had reason to anticipate, that his carelessness would injure another person.<sup>3</sup> The improbability of injury to another is

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<sup>1</sup> *Taylor v. Atlantic Ins. Co.*, 9 Bosw. 369. "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do" (Per Alderson, B., *Blyth v. Birmingham Waterworks Co.*, 11 Exch. 781).

<sup>2</sup> The defendant's servant was employed in drilling a hole into a gas main, in a thoroughfare, using for the purpose a "diamond point" chisel, which caused particles of iron to fly off, and thereby endanger passers-by. A less dangerous mode of doing the work would have been by drilling or screening. A piece of iron was chipped off and struck the plaintiff in the eye, and injured him. Held, that the fact that the accident would have been avoided by drilling or screening was evidence of negligence; and, therefore, that the defendant was liable (*Cleveland v. Spier*, 16 C. B. [N. S.] 399).

<sup>3</sup> The defendant's ship, in casting and drawing up her anchor, injured the plaintiff's submarine telegraph. Held, that the defendant was liable, if he used the anchor or ship without availing himself of the means of knowledge at his command, even though he was not aware of the position of the cable, but not otherwise (*Submarine Telegraph Co. v. Dickson*, 15 C. B. [N. S.] 759).



a circumstance that might be taken into account, but which is not conclusive of the question. In general, the word "negligence" is used in the sense of *culpable* negligence, but not always; and the distinction is therefore important, as will be seen more fully when we come to the subject of the various degrees of negligence.

§ 8. No one has a right of action upon negligence, who is not injured thereby. This is a self-evident proposition; but another is to be deduced from it not quite so evident, namely, that where injury on the part of the plaintiff, and negligence on the part of the defendant concur, the plaintiff cannot, nevertheless, recover, if the defendant could not have prevented the injury from occurring by the exercise of due care.<sup>1</sup> In other words, the defendant's *negligence*, and not merely his *act*, must be the cause of the plaintiff's injury.

§ 9. Negligence is also not actionable, unless it is the *proximate* cause of the injury complained of. The law cannot undertake to trace back the chain of causes indefinitely, for it is obvious that this would lead to inquiries far beyond human power and wisdom, in fact, infinite in their scope. Probably no injury ever happens for which less than a thousand persons have a certain share of moral responsibility. If a horse stumbles over an obstruction in the street, not only is the person who placed the obstruction responsible for the consequences, but, in the light of reason and morals, the city officers who neglected to remove the obstacle, the appointing power which failed to secure good officers, the electors who chose the appointing authorities, the local editors who knew the incompetency of the au-

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<sup>1</sup> Bellefontaine &c. R. Co. v. Bailey, 11 Ohio St. 333. See Lockhart v. Lichten-thaler, 46 Penn. St. 151.

thorities, but did not warn the voters of it, the parents, guardians, and teachers of all these persons, who failed to instruct them in their political duties, and a multitude of other persons, have all some share in bringing about the final injury. No one, however, imagines it possible for any human tribunal to apportion to each of this vast number of persons his just share of responsibility. Any attempt to do it would lead to the greatest conceivable injustice. The law, therefore, stops at the first link in the chain of causation, and looks only to the person who is the proximate cause of the injury.<sup>1</sup>

§ 10. Negligence may, however, be the proximate cause of an injury of which it is not the sole or immediate cause. If the defendant's negligence concurred with some other event (other than the plaintiff's fault) to produce the plaintiff's injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible, even though his negligent act was not the nearest cause in the order of time.<sup>2</sup> Strictly defined, an act is the proximate

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<sup>1</sup> See *George v. Smith*, 6 Ired. [N. C.] Law, 273; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Brooks v. Boston*, 19 Pick. 174; *Walrath v. Redfield*, 11 Barb. 368; *Ryan v. N. Y. Central R. Co.*, 35 N. Y. 210. Where a train ran over hose which was conveying water needed to extinguish a fire in the plaintiff's house, it was held that the damage was too remote to afford a cause of action (*Mott v. Hudson River R. Co.*, 1 Robertson, 585).

<sup>2</sup> In an action by a passenger against a carrier, the defendant asked the court to charge that if the injury occurred in part from an unforeseen cause, and in part by a cause attributable to negligence, the action could not be sustained.—Held, that the instruction was properly refused (*Brehm v. Great Western R. Co.*, 34 Barb. 256). Where the defendant's servant left the defendant's horse without being tied, and a third person frightened it, so that it ran away and injured the plaintiff's horse, it was held that the defendant was responsible, though the defendant's servant, after the horse began to run, did his best to stop it (*McCahill v. Kipp*, 2 E. D. Smith, 413). Where the defendant's servant, instead of putting up his master's cart in its usual place, left it standing by the sidewalk in the street, and, while so standing, another cart came in collision with it, and, in consequence of that collision, the plaintiff was injured, it was held that the defendant was liable to plaintiff in an action on the case

cause of an event, when, in the natural order of things, and under the particular circumstances surrounding it, such an act would necessarily produce that event.<sup>1</sup> But the practical construction of "proximate cause" by the courts, is a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue.<sup>2</sup>

§ 11. The question whether a party has been negligent in a particular case is one of mingled law and fact.<sup>3</sup> It in-

(Powell v. Deveney, 3 Cush. 300). The plaintiff's buildings were on fire, and while the firemen were endeavoring to extinguish it, the cars of the defendants passed over the hose, cutting and rendering it unfit for use, in consequence of which the plaintiff's buildings were consumed,—Held, that if the act was done by the concurring negligence of the defendants and the firemen, in such sense that the hose would not have been cut if either had been free from negligence, the plaintiff was entitled to recover (Mott v. Hudson River R. Co., 8 Bosw. 345). Although the recklessness of the driver of another stage may have contributed to cause the injury, yet, if there is any want of skill or prudence in the driver of the stage to which the accident occurred, directly contributing thereto, his principals are liable (Peck v. Neal, 3 McLean, 22, 26; Lockhart v. Lichtenthaler, 46 Penn. St. 151; see also Scott v. Shepherd, 2 Wm. Blacks. 892; Edwards v. Carr, 13 Gray, 234).

<sup>1</sup> See 4 Am. Law Review, 204.

<sup>2</sup> See Bellefontaine &c. R. Co. v. Snyder, 18 Ohio St. 399; Conn. Life Ins. Co. v. N. Y. & New Haven R. Co., 25 Conn. 265; Harrison v. Berkley, 1 Strobb. 525, 549; Bennett v. Lockwood, 20 Wend. 223; Greenland v. Chaplin, 5 Exch. 243. "The general rule is, that a man is answerable for the consequences of a fault which are natural and probable; but if his fault happen to concur with something extraordinary and unforeseen, he will not be liable. \* \* \* \* The maxim, *causa proxima non remota spectantur*, means this: one engaged in an act which the circumstances indicate may be dangerous to others, and the event whose concurrence is necessary to make the act injurious can be readily seen as likely to occur under these circumstances, the defendant is liable if he does not take all the care which prudence would suggest to avoid the injury" (McGrew v. Stone, 53 Penn. St. 436).

<sup>3</sup> Negligence, when the facts upon which the charge depends are disputed, is a mixed question of law and fact. "The jury must ascertain the facts, and the judge must instruct them as to the rule of law which they are to apply to the facts as they shall find them" (Purvis v. Coleman, 1 Bosw. 321). When the direct fact in issue is established by undisputed evidence, and such fact is decisive of the cause, a question of law is raised, and the court should decide it. The jury have no duty to perform. The issue of negligence comes within this rule (Dascomb v. Buffalo & State Line R. Co., 27 Barb. 221). Questions of care and negligence, after the facts are proven, must be decided by the court (Biles v. Holmes, 11 Ired. [N. C.] Law, 16; Avera v. Sexton, Id. 247; Heathcock v. Pennington, Id. 640; Herring v. Wilmington &c. R. Co., 10 Id. 402). A judge is not bound to submit to the jury the question of negli-

cludes, indeed, two questions : (1) Whether a particular act has been performed or omitted, and (2) whether the performance or omission of this act was a breach of a legal duty. The first of these is a pure question of fact, the second a pure question of law.<sup>1</sup> But it is very difficult to reduce cases to these simple elements. The extent of the defendant's duty is to be determined by a consideration of his circumstances. The law imposes duties upon men according to the circumstances in which they are called to act. And though the law defines the duty, the question, whether the circumstances exist which impose that duty upon a particular person, is one of fact.<sup>2</sup> In very many cases the law gives no better definition of negligence than the want of such care as men of ordinary prudence would use under similar circumstances. Of course, this raises a question of fact as to what men of this character usually do under the same circumstances. This is a point upon which a jury have a right to pass, even though no evidence of the usage were given; for they may properly determine the question by referring to their own experience and information. Consequently, a case of this kind must be left to the

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gence, although there may be a conflict of evidence in relation to some of the facts relied on as proving it—if, rejecting the conflicting evidence, the negligence charged is conclusively proved by defendant's own witnesses (*Moore v. Westervelt*, 1 Bosw. 357). If there is any conflict of evidence which cannot be thus disposed of, the question must be left with the jury, under proper instructions (*Ernst v. Hudson River R. Co.*, 35 N. Y. 9; *Seabrook v. Hecker*, 4 Robertson, 344; *Delafield v. Union Ferry Co.*, 5 Id. 207). In an action for damages for death occasioned by negligence, whether a given state of facts constitutes negligence, is generally a question of law; but whether a particular negligence contributed to the catastrophe, is a question of fact (*Catawissa R. Co. v. Armstrong*, 52 Penn. St. 282).

<sup>1</sup> *Tarwater v. Hannibal & St. Jo. R. Co.*, 42 Mo. 193.

<sup>2</sup> Thus, in a case where the plaintiff's sloop was run over by the defendant's steamboat, it was held, that whether there was negligence or not could not be considered purely a question of law, but as a mixed question. The facts are exclusively for the jury; and when those facts are ascertained, whether they will, in judgment of law, warrant the charge of negligence, is matter of law. But a case of this mixed character must always be submitted to the jury, unless there is a demurrer to the evidence (*Foot v. Wiswall*, 14 Johns. 304).

jury, even if there is no conflict of evidence,<sup>1</sup> unless, indeed, there is evidence enough to decide this point as well as all other questions in the cause.<sup>2</sup> In cases of this kind the courts have used such broad language as to the necessity of leaving the cause to the jury, that it might be inferred that every cause must be so left; but this is not the case. When the facts are clearly settled, and the course which common prudence dictated can be clearly discerned, the court should decide the case as a matter of law.<sup>3</sup>

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<sup>1</sup> Whether there was negligence or want of care, in whatever degree, in either of the parties, is a question of fact to be determined by the jury; and whether the circumstances attending the transaction constitute such negligence or want of care will not, though admitted, be decided by the court as matter of law, but will be left to the jury, as evidence for them to pass upon (*Beers v. Housatonic R. Co.*, 19 Conn. 566; see *Meyer v. Pacific R. Co.*, 40 Mo. 151; *Pennsylvania R. Co. v. Barnett*, 59 Penn. St. 259; *Toledo &c. R. Co. v. Foster*, 43 Ill. 415). In an action by an owner of a coach and horses, against the driver of another coach, for driving the wheels of his coach upon one of the horses attached to the plaintiff's coach, it is a question for the jury, whether the plaintiff's driver was guilty of such misconduct as to prevent the plaintiff's recovery; and the court cannot properly give peremptory instructions to the jury, that the defendant is entitled to a verdict because of the misconduct of the plaintiff's driver (*Munroe v. Leach*, 7 Metc. 274). Where it clearly appeared that the plaintiff's agent had omitted to return a counterfeit bill to the defendant, for more than two months, it was nevertheless held to be for the jury to determine whether such delay was culpably negligent (*Burrill v. Watertown Bank*, 51 Barb. 105).

<sup>2</sup> "Negligence, whether of the plaintiff or the defendant, is, in all instances, a question of fact, and it is only where a question of fact is entirely free from doubt that the court has the right to apply the law without the action of the jury" (*Bernhardt v. Rensselaer & Saratoga R. Co.*, 32 Barb. 165; *Keller v. N. Y. Central R. Co.*, 24 How. Pr. 172). "There is no absolute rule as to what constitutes negligence. That conduct which might be so termed in one case being in another properly considered ordinary care; nor, in cases where it is concurrent, will the same rule apply to adults and to children. It is, therefore, always a question of fact for the jury, under the instruction of the court, as to the relative degree of care, or the want of it, growing out of the circumstances and conduct of the parties" (*Phil. & Reading R. Co. v. Spearen*, 47 Penn. St. 300; and see *Vanderpool v. Husson*, 28 Barb. 196; *United States v. Taylor*, 5 McLean, 242; *Sheffield v. Rochester & Syr. R. Co.*, 21 Barb. 339; *Curtiss v. Rochester & Syr. R. Co.*, 20 Barb. 282; *Galena & Chicago R. Co. v. Yarwood*, 17 Ill. 509, 519; *Galena & Chicago R. Co. v. Dill*, 22 Ill. 264, 271).

<sup>3</sup> See *post*, § 483; *Biesiegel v. N. Y. Central R. Co.*, 40 N. Y. 9; *Stubley v. London & Northwestern R. Co.*, Law Rep. 1 Exch. 13; *Crafter v. Metropolitan R. Co.*, Law Rep. 1 C. P. 300; *Glassey v. Hestonville &c. R. Co.*, 57 Penn. St. 172; *Pittsburgh &c. R. Co. v. McClurg*, 56 Id. 294.

§ 12. The burden of proof, in an action upon negligence, always rests upon the party charging it, whom, for convenience, we may assume to be, as he almost invariably is, the plaintiff in the action.<sup>1</sup> It is not enough for him to prove that he has suffered loss by some event which happened upon the defendant's premises,<sup>2</sup> or even by the act or omission of the defendant. He must also prove that the defendant, in such act or omission, violated a duty resting upon him.<sup>3</sup> There is a class of cases which constitute an apparent exception to the rule,—such as actions against a carrier, a depositary, &c.<sup>4</sup> But these are not a real exception. The defendant in such cases is under a positive obligation to deliver safely the thing committed to him, except under special circumstances beyond his control. His failure to deliver safely puts him *prima facie* in the wrong, and it is for him to prove the exceptional circumstances which excuse him. But where no such special relation exists, the presumption is that the defendant has complied with all the obligations which rest equally upon every man; and if he has not, the plaintiff must prove it. He must, for this purpose, prove facts from which it can be ascertained with reasonable certainty what particular precaution the defendant ought to have taken, but did not take.<sup>5</sup> And he must

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<sup>1</sup> If the evidence would justify an inference consistent with the absence of negligence on the part of the defendant, just as well as it would an inference of negligence, the plaintiff cannot recover (*Smith v. First National Bank*, 99 Mass. 605).

<sup>2</sup> *Curran v. Warren Chemical Mfg. Co.*, 36 N. Y. 153; *Welfare v. London & Brighton R. Co.*, Law Rep. 4 Q. B. 693.

<sup>3</sup> *McGrath v. Hudson River R. Co.*, 32 Barb. 144; *Robinson v. Fitchburg &c. R. Co.*, 7 Gray, 92; *De Benedetti v. Mauchin*, 1 Hilt. 213; *Weitner v. Del. & Hudson Canal Co.*, 4 Robertson, 234; *Allen v. Willard*, 57 Penn. St. 374; *M'Cully v. Clarke*, 40 Penn. St. 399; *Terre Haute &c. R. Co. v. Augustus*, 21 Ill. 186; *Lester v. Pittsford*, 7 Verm. 158; *Balt. & Ohio R. Co. v. Buhrs*, 28 Md. 647; *Herring v. Wilmington &c. R. Co.*, 10 Ired. [N. C.] Law, 402; *Daniel v. Metropolitan R. Co.*, Law Rep. 3 C. P. 216, 591; *Tourtellot v. Rosebrook*, 11 Metc. 460; *Batchelder v. Heagan*, 1 Maine, 32.

<sup>4</sup> *Arent v. Squire*, 1 Daly, 347. Compare *Watson v. Bauer*, 4 Abb. [N. S.] 273.

<sup>5</sup> *Daniel v. Metropolitan R. Co.*, Law Rep. 3 C. P. 216, 591.

also prove facts from which it can fairly be inferred that the defendant's negligence caused the injury complained of.<sup>1</sup>

§ 13. The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant, and of resulting injury to himself. Having done this, he is entitled to recover, unless the defendant produces evidence sufficient to rebut this presumption. Though it is not every accident that will warrant an inference of negligence, yet it is not true that no accident will suffice for this purpose.<sup>2</sup> If the plaintiff proves that he has been injured by an act of the defendant, of such a nature that in similar cases, where due care has been taken, no injury is known to ensue, he raises a presumption against the defendant, which the latter must overcome by evidence either of his carefulness in the performance of the act, or of some unusual circumstance which makes it at least as probable that the injury was caused by some circumstance with which he had nothing to do, as by his negligence.<sup>3</sup> It has sometimes been held not sufficient for the plaintiff to establish a probability of the defendant's fault;<sup>4</sup>

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<sup>1</sup> *Sheldon v. Hudson River R. Co.*, 29 Barb. 226; see S. C. again, 14 N. Y. 218; and *post*, § 333.

<sup>2</sup> *Byrne v. Boadle*, 2 Hurlst. & C. 722. The bursting of a boiler in a steamboat is sufficient presumptive evidence of negligence against its owners (*McMahon v. Davidson*, 12 Minn. 357).

<sup>3</sup> *Ellis v. Portsmouth &c. R. Co.*, 2 Ired. [N. C.] Law, 138; *Herring v. Wilmington &c. R. Co.*, 10 Id. 402; *Scott v. London Docks Co.*, 3 Hurlst. & C. 596; see *Briggs v. Oliver*, 4 Id. 403. Where a railroad agent offered to pay for certain cattle killed, but the owner thought the offer too small and brought suit, it was held that the *onus* of disproving negligence was put upon the railroad company (*Georgia R. Co. v. Willis*, 28 Geo. 317). This, however, seems to us an erroneous decision. If generally followed, it would discourage all compromises of suits, and thus promote needless litigation.

<sup>4</sup> *Sheldon v. Hudson River R. Co.*, 29 Barb. 226; *Lehman v. Brooklyn*, 29 Barb. 234. Mere proof that the defendant kept a well on the highway, having a cover level with the road, with a lid opening on hinges, and that a child, four years of age, was found dead in the well half an hour after leaving his house, was held not sufficient to sustain the verdict of a jury that the death of the child was caused by the negligence of the defendant (*Lehman v. Brooklyn*, 29 Barb. 234).

but this is going too far. If the facts proved make it probable that the defendant violated his duty, it is for the jury to decide whether he did so or not. To hold otherwise would be to deny the value of circumstantial evidence.

§ 13 a. The failure of any person to perform a duty imposed upon him by statute or other legal authority, should always be considered evidence of negligence or of something worse. Whether it constitutes such negligence as the plaintiff, in any particular case, has a right to complain of, is another question, the principles governing which are stated elsewhere;<sup>1</sup> but such an omission must constitute just cause for complaint on the part of the state, if not of individuals; and where no evil intent appears, the omission may properly be regarded as simple negligence. The omission to perform a legal duty being proved, the plaintiff ought not to be required to prove further that the act omitted was inherently essential to the exercise of due care by the defendant.<sup>2</sup> Thus, if a railroad company is required by law to fence its track, to ring bells, or to give other warnings of danger, or if one building a wall is required to make it of a certain thickness, or if obstructions to a street are prohibited, a violation of any of these legal regulations is sufficient evidence of negligence.

§ 14. The owner of property may recover directly from the wrong-doer for any tortious injury to the property, without noticing any contract which the wrong-doer may have made with respect to such property, of which the wrongful act is a violation. This is so, whether the contract was made with the owner himself or with any other person,<sup>3</sup> and even though the contract be under

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<sup>1</sup> *Ante*, § 8; *post*, § 54 a.

<sup>2</sup> *Jetter v. N. Y. & Harlem R. Co.*, 2 Keyes [N. Y.] 154; *Langhoff v. Milwaukee &c. R. Co.*, 19 Wis. 489. But compare *Brown v. Buffalo &c. R. Co.*, 22 N. Y. 191.

<sup>3</sup> *Green v. Clarke*, 12 N. Y. 343. In that case it was held that the owner of goods



seal.<sup>1</sup> The contract, if made with any other person than the owner, does not give that person an exclusive right to sue for damage to the property;<sup>2</sup> and if made with the owner, it does not prevent him, or any person who afterward acquires title to the property,<sup>3</sup> from enforcing his rights without relying upon the contract, except, of course, so far as those rights are waived by the contract.

§ 15. As a liability cannot be delegated so as to compel a third person to seek redress for the principal's negligence against an agent or other person, it follows that one who is bound to perform a duty cannot relieve himself from liability for its non-performance by any contract which he may make for its performance by another person. Therefore, the fact that he may have used the utmost care in selecting an agent to perform this duty,<sup>4</sup> or that he has entered into a contract with any person by which the latter undertakes to perform the duty, is no excuse to the

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might sue a carrier for their loss, notwithstanding the carrier had received them from a forwarder, to whom he was liable. So a master can recover from a carrier (*Grant v. Newton*, 1 E. D. Smith, 95), or innkeeper (see *Needles v. Howard*, 1 E. D. Smith, 54; *Piper v. Manny*, 21 Wend. 282), for the loss of his property placed in the defendant's charge by a servant traveling with it as its ostensible owner. Such an action may be brought in the name of a firm where one of the partners, traveling alone, deposits baggage containing partnership property with a carrier or innkeeper, who negligently loses it (*Needles v. Howard*, 1 E. D. Smith, 54). So a servant, whose master paid for tickets for both, may recover for his own baggage lost on the journey (*Marshall v. York & C. R. Co.*, 21 L. J. [C. P.] 34). But in all such cases the action must be founded upon the tort, and cannot be sustained at all upon the contract; because carriers of persons and innkeepers always deal with their customers as principals, and the most important part of the contract being always made by the customers as principals, they cannot be allowed to divide it, and claim that the contract, in respect to their baggage, was made for the benefit of other persons, while retaining themselves the rights growing out of the contract in respect to their persons (see *Weed v. Saratoga & C. R. Co.*, 19 Wend. 534; *Needles v. Howard*, 1 E. D. Smith, 54).

<sup>1</sup> *Leslie v. Wilson*, 3 Brod. & B. 171.

<sup>2</sup> *Green v. Clarke*, 12 N. Y. 343; *New Jersey Steam Co. v. Merchants' Bank*, 6 How. [U. S.] 344; *Cumberland Valley R. Co. v. Hughes*, 11 Penn. St. 141.

<sup>3</sup> *Dows v. Cobb*, 12 Barb. 310.

<sup>4</sup> *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; *Grote v. Chester & C. R. Co.*, 2 Exch. 251. But see *Sutton v. Clark*, 6 Taunt. 29; *Hall v. Smith*, 2 Bing. 156.

person on whom the obligation originally rested, in case of failure of performance. His obligation is to do the thing, not merely to employ another to do it.<sup>1</sup> Thus, a municipal corporation, bound to repair its streets, is not relieved from liability for non-repair by the fact that it has made a contract for such repairs with a responsible and competent person,<sup>2</sup> and a railroad company cannot defend itself against the claims of passengers for injuries, by showing that it has employed the best servants that it could possibly obtain.<sup>3</sup>

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<sup>1</sup> *Hole v. Sittingbourne R. Co.*, 6 Hurlst. & N. 488; *Pickard v. Smith*, 19 C. B. [N. S.] 480. In the latter case the distinction is clearly pointed out between the responsibility of a person who causes something to be done which is wrongful, or fails to perform something which there was a legal obligation on him to perform, and the liability for the negligence of those who are employed in the work. Williams, J., said, that the rule exempting employers of contractors from liability was "inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfillment, whereby an injury is occasioned." "If the performance of the duty be omitted, the fact of his having intrusted it to a person who also neglected it, furnishes no excuse, either in good sense or in good law." See *Mersey Docks Trustees v. Gibbs* (Law Rep. 1 H. L. 93), where many cases on this point are reviewed. See also, to the same effect, *Blackstock v. N. Y. & Erie R. Co.*, 20 N. Y. 48; *Weed v. Panama R. Co.*, 17 N. Y. 362; *Gray v. Pullen*, 5 Best & S. 970; *Baird v. Addie*, Hay, 187; *Nisbett v. Dixon*, Hay, 145; 14 Dunlop, 973. One who contracts with another to do a wrongful thing, such as digging in a highway, cannot relieve himself from the consequences by the terms of his contract, by which the contractor stipulated to guard against accidents (*Congreve v. Smith*, 18 N. Y. 79; *Creed v. Hartmann*, 29 Id. 591; *Dygert v. Schenck*, 23 Wend. 446).

<sup>2</sup> *Storrs v. Utica*, 17 N. Y. 104. See the chapters on MUNICIPAL CORPORATIONS, HIGHWAYS, and MASTER AND SERVANT; *Grote v. Chester &c. R. Co.*, 2 Exch. 251; *Allen v. Hayward*, 7 Q. B. 960.

<sup>3</sup> Thus, if by reason of work done by a railroad company in the neighborhood of their track, a stone rolls on the track and obstructs it, that work being such that any negligence in its performance would be likely to cause such an obstruction, they are liable to a passenger for an accident caused by the obstruction, although they employ a skillful contractor to perform the work (*Virginia &c. R. Co. v. Sanger*, 15 Gratt. 230). In this case, the contractor was ballasting the track (this being necessary for its preservation rather than for the security of passengers), and had piled the stone so near the track that it was rolled upon it, either by the jarring of the passing train or by a workman getting out of the way of the train, and thereby caused an accident. The company were held responsible to a passenger thereby injured.

## CHAPTER II.

### DEGREES OF NEGLIGENCE.

- SEC. 16. Distinction between degrees of negligence.  
17. The distinction just and reasonable.  
18. The different degrees of negligence defined.  
19. Certain tests unsatisfactory.  
20. The different degrees of care defined.  
21. Care of one's own affairs not conclusive test.  
22. Effect of relation of parties on the obligation of care.  
23. Effect of nature of subject on the obligation of care.  
24. Degree of care required for human life.

§ 16. The civil law affirms the existence of three degrees of negligence: slight, ordinary, and gross.<sup>1</sup> The distinction between these degrees of negligence has been repeatedly recognized in the courts of common law; but of late, the existence of such a distinction has been denied<sup>2</sup> as merely theoretical, and wholly incapable of any practical application. But it will be found that in most of the cases in which this view is taken, the question at issue was simply whether a stipulation against liability for "negligence" protected the party receiving it from liability for

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<sup>1</sup> Story, Bailm. § 18; Digest, lib. 50, t. 16, § 223.

<sup>2</sup> Thus, Denman, C. J., doubted whether any intelligible distinction could be made "between gross negligence and negligence merely" (*Hinton v. Dibbin*, 2 Q. B. 646, 661); and this remark has been cited with approval by Smith, J., in *Perkins v. N. Y. Central R. Co.* (24 N. Y. 196, 206); and by Cresswell, J., in *Austin v. Manchester &c. R. Co.* (10 C. B. 454, 474). In *Wells v. N. Y. Central R. Co.* (24 N. Y. 181), Sutherland, J., disapproved of the classification of negligence into degrees, saying that it might be philosophically correct, but was impracticable, and that attempts to make it practicable had produced confusion and mischief. In *Smith v. N. Y. Central R. Co.* (24 N. Y. 222, 241), Allen, J., took the same view. In *New World v. King* (16 How. [U. S.] 474), Curtis, J., expressed grave doubt whether these terms could be usefully applied in practice. In *Wilson v. Brett* (11 Mees. & W. 113), Rolfe, B., said, he "could see no difference between *negligence* and *gross negligence*; that it was the same thing with the addition of a vituperative epithet." This remark was cited and approved by Willes, J., in *Grill v. General &c. Collier Co.*, Law Rep. 1 C. P. 600, 612.

*gross* negligence, and it was held that it did, the term negligence including all its grades.<sup>1</sup> This may be conceded, without involving the conclusion that there are no distinguishable grades of negligence.<sup>2</sup> Indeed, the definition which we have given includes, under that word, not only all the possible shades of neglect for which the law has at any time awarded compensation, but also those infinitesimal neglects of which the law never takes notice. On the other hand, as we have said, there are many cases in which these distinctions have been affirmed and applied.<sup>3</sup>

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<sup>1</sup> This was the question in all the cases last cited, except *Wilson v. Brett*, 11 Mees. & W. 113.

<sup>2</sup> Thus, in pleading, it is held that an averment of negligence is sufficient to admit proof of gross negligence, and that, on demurrer, an averment of negligence merely is equivalent to an averment of whatever degree of negligence is necessary to sustain the pleading (*Nolton v. Western R. Co.*, 15 N. Y. 444). The contrary was held, upon demurrer to a plea, in *Bridge v. Grand Junction R. Co.* (8 Mees. & W. 244), but we think erroneously.

<sup>3</sup> There are many cases which have turned upon the distinctions between the different classes of negligence, or in which an argument has been based upon them by the courts. Thus, it has been held that a stipulation in a bill of lading, that goods should be at the risk of the owner, does not excuse the carrier from liability for gross negligence (*Alexander v. Greene*, 7 Hill, 533; *Wells v. Steam Navigation Co.*, 8 N. Y. 375). Common carriers of passengers have been repeatedly held liable for injuries which could not have been avoided by any *ordinary* degree of care, on the express ground, that they were bound to use the utmost care (*Caldwell v. Murphy*, 1 Duer, 233; *Bowen v. N. Y. Central R. Co.*, 18 N. Y. 408; *Hegeman v. Western R. Co.*, 13 N. Y. 924; *Sharp v. Grey*, 9 Bing. 657; 2 Moore & Sc. 620; *Burns v. Cork & Bandon R. Co.*, 13 Irish C. L. 543; *Frink v. Potter*, 17 Ill. 406; see *Farish v. Reigle*, 11 Gratt. 697; *Derwort v. Loomis*, 21 Conn. 245; *Edwards v. Lord*, 49 Maine, 279; *Ingalls v. Bills*, 9 Metc. 1, and many other cases). So it has been held, where the plaintiff was charged with contributing to his injury by his own negligence, that he was not debarred from recovering by merely slight negligence (*Fero v. Buffalo & C. R. Co.*, 22 N. Y. 209; *Johnson v. Hudson R. Co.*, 6 Duer, 633, 645; *Center v. Finney*, 17 Barb. 94; *Eakin v. Brown*, 1 E. D. Smith, 36; *Beers v. Housatonic R. Co.*, 19 Conn. 566; *McGrath v. Hudson River R. Co.*, 32 Barb. 144). And where the defendant pleaded that the plaintiff was negligent, the plea was held bad for want of an averment of ordinary negligence (*Bridge v. Grand Junc. R. Co.*, 8 Mees. & W. 244), the court deeming that the plea might only mean that the plaintiff had been slightly negligent. Where the judge at the trial charged the jury that the defendant was not excused unless the plaintiff had been guilty of *gross* negligence, a new trial was ordered, the court saying that ordinary care was required (*Cashill v. Wright*, 6 El. & Bl. 891). So, where the judge charged that the defendants were bound to use the *utmost* care, in a case which the court thought called only for ordinary care, the judgment was reversed for misdirection (*Brand v. Schenectady & C. R. Co.*, 8 Barb. 368).

§ 17. Notwithstanding the adverse opinions cited, we think the distinction a real and valuable one. It can never be reasonable to require precisely the same degree of care from a gratuitous employee as from a hired one, or from one who receives a chattel at the request and for the benefit of the owner, as from one who borrows it for his own pleasure; and so long as different degrees of care are required, there can be no just objection to giving names to them, and to their corresponding degrees of negligence.<sup>1</sup> And it is noticeable that the necessity of distinguishing between different degrees of *care* has never been denied.<sup>2</sup> If, however, any one prefers to dispense with these adjectives, he can do so, by giving, in each case, a definition of the precise kind of care which should be required.

§ 18. Assuming, then, that the classification of the civil law is to be retained, its definitions of the three degrees of negligence cannot be greatly improved. Slight negligence is the want of great care and diligence;<sup>3</sup> ordinary negligence is the want of ordinary care and diligence;<sup>4</sup> and gross negligence is the want of even slight care and diligence.<sup>5</sup> The lower degrees of negligence

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The distinction has been also recognized in many other cases (*Edson v. Weston*, 7 Cow. 278; *Doorman v. Jenkins*, 2 Ad. & El. 256; *Vaughan v. Menlove*, 3 Bing. N. C. 468; *Purves v. Landell*, 12 Clark & Fin. 91; *Godefrey v. Dalton*, 6 Bing. 461; *Baikie v. Chandless*, 3 Campb. 17; *Shiells v. Blackburn*, 1 H. Blackst. 158; *Monteith v. Bissell*, Wright [Ohio], 411; *Storer v. Gowen*, 18 Maine, 174; *Whitney v. Lee*, 8 Metc. 91; *Green v. Hollinsworth*, 5 Dana, 173; *Bakewell v. Talbot*, 4 Id. 216; *Chase v. Maberry*, 3 Harringt. 266; *Spooner v. Mattoon*, 40 Verm. 300).

<sup>1</sup> See *Phillips v. Clark*, 5 Jur. [N. S.] 1081; 5 C. B. [N. S.] Amer. ed. 881.

<sup>2</sup> This distinction was approved in the latest case in which the distinction between degrees of *negligence* was condemned (*Grill v. General Iron Screw Co.*, Law Rep. 1 C. P. 600).

<sup>3</sup> Story, Bailm. § 17.

<sup>4</sup> Story, Bailm. § 17. See *infra*, § 20; *Wyld v. Pickford*, 8 Mees. & W. 443, 461.

<sup>5</sup> Story, Bailm. § 17; *Cashill v. Wright*, 6 El. & Bl. 891, 899. In *Duff v. Budd* (3 Brod. & B. 177; 6 J. B. Moore, 469), and *Holmes v. Peck* (1 R. I. 245), gross negligence was defined as the lack of ordinary care (see *Batson v. Donovan*, 4 B. & Ald. 21; in which Bayley, J., must have taken the same view), but this is clearly wrong. *Duff v. Budd* was commented on in *Wyld v. Pickford* (8 Mees. & W. 443, 461), and in effect overruled in *Cashill v. Wright*, *supra*. See a similar mistake commented upon in *Goodman v. Walker* (30 Ala. [N. S.] 482).

include the higher: that is, ordinary negligence includes slight negligence, and gross negligence includes both the others.<sup>1</sup>

§ 19. The degrees of care and diligence have been defined upon two different theories: one based upon the measure of care which the same man might be supposed to give to things of unequal importance to him, and the other upon the measure of care which different men would give to the same thing. Under the former rule, slight care would be such as a prudent man usually takes of his least important concerns; ordinary care, such as the same person usually takes of his common affairs; and great care, such as he takes of his most important matters. This rule is objectionable, because it seems to apply the same test of care to articles of a widely different nature. Thus, one may borrow a mule, and be bound to take great care of it, but this doctrine affords no test of the degree of care required, except by comparing it with that which a prudent man would take of a thorough-bred race horse; or if one borrows a hay cart, he must, according to this doctrine, take the same care of it as of his own best carriage: tests plainly inapplicable.

§ 20. The better rule is that which declares slight care to be such as is usually exercised under circumstances similar to those of the particular case in which the question arises,<sup>2</sup> and where their own interests are to be protected from a similar injury,<sup>3</sup> by men of common sense, but

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<sup>1</sup> *Keefer v. Firemen's Ins. Co.*, 3 Hill, 250, 256.

<sup>2</sup> This branch of the definition applies to all the degrees of care (*Johnson v. Hudson River R. Co.*, 20 N. Y. 65; affirming S. C., 6 Duer, 633; *Mazetti v. Harlem R. Co.*, 3 E. D. Smith, 98; *Grant v. Ludlow*, 8 Ohio St. 1; *Cleveland &c. R. Co. v. Terry*, Id. 570, 581; *Fallon v. Boston*, 3 Allen, 38; *Fletcher v. Boston & Maine R. Co.*, 1 Id. 9, 15; *Holly v. Boston Gaslight Co.*, 8 Gray, 123, 131).

<sup>3</sup> *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; *Duff v. Budd*, 3 Brod. & B. 177; 6 J. B. Moore, 469; *Schwartz v. Gilmore*, 45 Ill. 455. This is a vital element of the definition, very often overlooked. Thus, in determining whether a railroad engineer has been negligent in running over a horse, the test of his care is not the care

below the average prudence of the community in which they live,<sup>1</sup> ordinary care to be such as is usually exercised under the like circumstances by men of average prudence,<sup>2</sup> and great care to be such as is exercised under such circumstances by men of unusual prudence.<sup>3</sup> Or, to put the case in another form, great care implies the use of more vigilance and caution than men of average prudence would use for themselves, ordinary care means such as is used by men of average prudence for themselves, and slight care means so little as to justify a suspicion that the person lacking it was indifferent to the consequences of his neglect.

§ 21. It has sometimes been said that the sole test of due care in respect to property is, that a man should keep or use the property of another as his own;<sup>4</sup> but this has been explicitly repudiated,<sup>5</sup> and very properly, because

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generally taken by an engineer to avoid injuring other people's horses, but the care which a prudent engineer would take if he saw *his own* horse upon the track. So, where a reservoir burst, and the water did damage to an adjoining garden, it was held that the owners of the reservoir were bound to take the same degree of care which they would have been likely to take had the garden been their own (*Todd v. Cochell*, 17 Cal. 97), and no greater care (*Campbell v. Bear River Mining Co.*, 35 Cal. 679).

<sup>1</sup> Story, *Bailm.* § 16. Sir William Jones (*Essay on Bailm.* 8) uses even broader language, defining it as the care given by men of common sense, "however inattentive," an expression adopted in *Tompkins v. Saltmarsh* (14 Serg. & R. 275), but properly rejected by Judge Story, and quite inconsistent with later cases, such as *Doorman v. Jenkins* (2 Ad. & El. 256), and *Rooth v. Wilson* (1 B. & Ald. 59). In respect to bailments, slight care has been defined in some cases as that care which gratuitous bailees, of common prudence, are accustomed to take of property in their charge (*Tracy v. Wood*, 3 Mason, 132; *Bland v. Wormack*, 2 Murph. 373). This may be a useful definition in respect to the care of property, but it will not suffice for all cases.

<sup>2</sup> *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 27; *Heathcock v. Pennington*, 11 *Ired.* [N. C.] Law, 640.

<sup>3</sup> *Brand v. Schenectady & C. R. Co.*, 8 Barb. 368, 379; *Brown v. Lynn*, 31 Penn. St. 512; *Dreher v. Fitchburg*, 22 Wisc. 675. See *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; 6 Duer, 633.

<sup>4</sup> *Anderson v. Foresman*, *Wright* [Ohio], 598.

<sup>5</sup> *Doorman v. Jenkins*, 2 Ad. & El. 256; *Rooth v. Wilson*, 1 B. & Ald. 59; *Tracy v. Wood*, 3 Mason, 132. In the first case, the defendant had left money of his own, as well as of the plaintiff's, in his bar-room, and the whole was stolen. *Taunton, J.*,

many men are reckless to the last degree of their property, and even of their lives: a fact which in no way justifies them in a like disregard for the interest of their neighbors.

§ 22. In determining the measure of care and diligence to which any one is bound, it is necessary to distinguish first between the obligations of persons who do, and of those who do not stand in peculiar relations to one another. It is the duty of every man to conduct himself, and to manage his property, with ordinary care and diligence,<sup>1</sup> and with no more than that,<sup>2</sup> unless he has increased or diminished his responsibility by assuming some special relation with the person who seeks to enforce it. But if one does an act of pure favor for another, with the assent of the latter, his responsibility to him is reduced to the duty of merely slight care and diligence.<sup>3</sup> And, on the other hand, the party receiving the favor is bound to exercise great care and diligence therein for the benefit of the party conferring it.

§ 23. We have said that in estimating the degree of care which it is incumbent upon any person to use, the situation of such person, rather than the subject of his care, is to be

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said he thought the fact of the defendant's having lost his own money in the same way was perfectly immaterial, and a verdict for the plaintiff was sustained, although Denman, C. J., before whom the cause was tried, thought the verdict unsatisfactory upon the evidence in other respects. In the second case, the defendant had put the plaintiff's horse into a field with his own cattle, but the horse, being unaccustomed to the place, fell through a breach in the fence during the night. A verdict for the plaintiff was sustained. In the third case, the defendant put his own money, as well as the plaintiff's, in a valise, which he left in a berth on a steamer, while he went to a theatre. The plaintiff's money being stolen, the defendant was held liable. These were all cases of gratuitous service.

<sup>1</sup> The owners of a dam are bound to this degree of care, skill, and diligence in so constructing it as to prevent its breaking away to the injury of others (*Shrewsbury v. Smith*, 12 Cush. 177). So are the owners of a reservoir (*Todd v. Cochell*, 17 Cal. 97; but compare *Rylands v. Fletcher*, Law Rep. 3 H. L. 330). For other cases, see the chapter on HIGHWAYS.

<sup>2</sup> *Campbell v. Bear River Mining Co.*, 35 Cal. 679; *Schwartz v. Gilmore*, 45 Ill. 455.

<sup>3</sup> *Spooner v. Mattoon*, 40 Verm. 300.



taken into account.<sup>1</sup> But in determining what amounts to any specified degree of care in each particular case, the thing to be taken care of, and the danger to which it is exposed, are the chief considerations.<sup>2</sup> Thus, the same person may at the same time be entrusted with the charge of coal, books and diamonds, and be bound to no more than ordinary care in respect to any of them, yet the amount of thought, attention, and pains which he would be required to bestow upon them respectively would greatly differ. He would fully discharge his duty by putting the coal in his bin, and, in many parts of the country would not need to lock it up; while it would generally be his duty to put the books in a good room, and the diamonds in some secret place, keeping a careful watch over them.

§ 24. The common law has a peculiar regard for human life; and for this reason exacts a greater degree of care when life is at peril, than in relation to any matter of mere property.<sup>3</sup> Accordingly, the law requires from all persons, including those who render gratuitous services, at least ordinary care for the safety of life; from those who render service for compensation, great care;<sup>4</sup> and from those whose business or occupation necessarily involves great risk of life, it demands a peculiar degree of vigilance,

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<sup>1</sup> *Ante*, § 19.

<sup>2</sup> *Heathcock v. Pennington*, 11 Ired. [N. C.] Law, 640; *State ex rel. Townshend v. Meager*, 44 Mo. 356. See *Garmon v. Bangor* (38 Maine, 443), where it was held that one driving in a crowded street must take more care than he need take if the street were clear. See also *McGrew v. Stone*, 53 Penn. St. 436.

<sup>3</sup> See *Deane v. Clayton*, 7 Taunt. 489; S. C. more fully reported, 2 Marshall, 277. Although at common law, no action would lie to recover *damages* for an injury causing death, this was simply for technical reasons. The relatives of a murdered man were allowed to maintain a private action for the execution of the murderer, until a recent period (see *Ashford v. Thornton*, 1 B. & Ald. 405).

<sup>4</sup> *Clark v. Eighth Av. R. Co.*, 32 Barb. 657. Ordinary care must be measured by the character, risks and exposures of business; and the degree required is higher where life or limb is endangered, or a large amount of property is involved, than in other cases (*Cayzer v. Taylor*, 10 Gray, 274; *Loomis v. Terry*, 17 Wend. 496).

and sagacity, sometimes called "the utmost care."<sup>1</sup> The killing of a human being by culpable negligence being a criminal offense, it is obvious that the law in civil cases ought to follow the criminal law, and even to go beyond it; so that there is a manifest propriety in affording redress, in a civil action, for a low degree of the same negligence which, in a little higher degree, the law would punish as a crime. Moreover, upon the principle already stated,<sup>1</sup> that ordinary care means the degree of care taken by men of ordinary sense and discretion to avoid injury to their own interests, it being plain that such men would, where their own lives were at risk, use a degree of care which, in respect to any thing else, would be considered very great, it follows that a like degree of care in respect to the lives of others should be required from all men who, under similar circumstances, but with mere property interests at risk, would be bound to use ordinary care.

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<sup>1</sup> So held in respect to railroads, in favor of passengers thereon, in all cases (*Bowen v. N. Y. Central R. Co.*, 18 N. Y. 408; *Hegeman v. Western R. Co.*, 13 N. Y. 9, 24; affirming S. C., 16 Barb. 353), and in favor of persons crossing a track on a level with a highway, during the night (*Johnson v. Hudson River R. Co.*, 20 N. Y. 65; affirming S. C., 6 Duer, 633). So, also, with regard to the use of fire-arms (see *Castle v. Duryea*, 32 Barb. 480; affirmed, 2 Keyes, 169). So where defendant, being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, and damage accrued to the plaintiff's son, in consequence of the girl presenting the gun at him, and drawing the trigger, when the gun went off: Held, that the defendant was liable to damages, in an action upon the case (*Dixon v. Bell*, 1 Stark. 287). Where a slave was killed by a discharge from a gun, it was held that the person carrying it was liable to the owner of the slave, unless he could prove that he was absolutely free from fault (*Morgan v. Cox*, 22 Mo. 373). In *Fleet v. Hollenkemp* (13 B. Monr. 219), a very stringent rule was laid down by the court.

<sup>2</sup> *Ante*, § 20.

## CHAPTER III.

### CONTRIBUTORY NEGLIGENCE.

- Sec. 25. The general rule stated.
26. Conflict of cases under the rule.
27. Fault must be that of plaintiff.
28. Plaintiff may recover unless in fault.
29. Plaintiff bound only to use ordinary care.
30. Ordinary care defined.
31. Plaintiff not bound to foresee defendant's negligence.
32. Plaintiff not barred by his negligence not contributing to injury.
33. Plaintiff's fault must proximately contribute to injury.
34. To bar plaintiff's action, it is not essential that he should cause the injury.
35. Aggravation of injury by plaintiff's negligence.
36. Effect of defendant's negligence after notice of plaintiff's danger.
37. Effect of defendant's gross negligence under the rule.
38. A mere trespasser is not barred.
39. Wrongdoers generally, when barred.
40. Illustrations of the rule.
41. Effect of plaintiff's fault in a special capacity.
42. Reason of the rule as to contributory negligence.
43. Burden of proof as to plaintiff's negligence.
44. Review of decisions on burden of proof.
45. Presumption of care, how overbalanced.
46. Negligence of third party, when imputable to plaintiff.
47. Knowledge of principal, when imputed to agent.
48. What negligence is imputed to a child.
- 48a. Rule in Pennsylvania, Ohio, &c.
49. What is deemed negligence on the part of a child.
50. Parental fault not imputed to minors of years of discretion.
51. What negligence imputed to lunatics.
52. Application of the rule to action on injury causing death.

§ 25. One who is injured by the mere negligence of another cannot recover at law or in equity<sup>1</sup> any compensa-

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<sup>1</sup> The rule in admiralty is different. There the loss is equitably apportioned according to the degree of negligence on each side (*Cushing v. The Fraser*, 21 How. [U. S.] 184; *Rogers v. The St. Charles*, 19 Id. 108; *The Catharine v. Dickinson*, 17 Id. 170; *Vaux v. Sheffer*, 8 Moore P. C. 75). But in a court of common law the same rule is applied to cases of maritime collisions as to any other (*Dowell v. General Steam Nav. Co.*, 5 El. & Bl. 195; *General Steam Nav. Co. v. Mann*, 14 C. B. 127; *Wright v. Brown*, 4 Ired. [N. C.] Law, 95; see *Delafield v. Union Ferry Co.*, 10 Bosw. 216; *Barnes v. Cole*, 21 Wend. 188).

tion for his injury, if he, by his own or his agent's<sup>1</sup> ordinary negligence<sup>2</sup> or willful wrong,<sup>3</sup> proximately contributed<sup>4</sup> to produce the injury of which he complains, so that, but for his concurring and co-operating fault, the injury would not

<sup>1</sup> In an action against the defendant for the negligence of his agent in pulling down the party wall between the houses of the plaintiff and defendant, it is a good defense to show that the plaintiff appointed an agent to superintend the work jointly with the defendant's agent, and that both agents were to blame (*Hill v. Warren*, 2 Starkie, 377).

<sup>2</sup> *Wilds v. Hudson River R. Co.*, 24 N. Y. 430; 23 How. Pr. 492; *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; *Button v. Hudson River R. Co.*, 18 Id. 248; *Welling v. Judge*, 40 Barb. 193; *Bowman v. Troy & Boston R. Co.*, 37 Barb. 516; *Mangam v. Brooklyn R. Co.*, 36 Barb. 230; *Bieseigal v. N. Y. Central R. Co.*, 33 Barb. 429; *Cox v. Westchester Turnpike Co.*, Id. 414; *Spooner v. Brooklyn R. Co.*, 31 Id. 419; *Dascomb v. Buffalo &c. R. Co.*, 27 Id. 221; *Sheffield v. Rochester &c. R. Co.*, 21 Id. 339; *Terry v. N. Y. Central R. Co.*, 22 Id. 574; *Willetts v. Buffalo &c. R. Co.*, 14 Barb. 585; *Marsh v. N. Y. & Erie R. Co.*, Id. 364; *Haring v. N. Y. & Erie R. Co.*, 13 Id. 9; *Talmadge v. Rensselaer &c. R. Co.*, Id. 493; *Runyon v. Central R. Co.*, 1 Dutch. 556; *Ohio &c. R. Co. v. Gullett*, 15 Ind. 487; *Evansville &c. R. Co. v. Lowdermilk*, Id. 120; *Washburn v. Tracy*, 2 Chipm. 136.

<sup>3</sup> *Terry v. N. Y. Central R. Co.*, 22 Barb. 574; *Roulston v. Clark*, 3 E. D. Smith, 366. Therefore, where the plaintiff rode upon the locomotive of the defendants, with notice that it was contrary to the defendants' orders to the engineer, it was held that the plaintiff could not recover for any injuries received through the defendants' negligence while on the engine (*Robertson v. N. Y. & Erie R. Co.*, 22 Barb. 91).

<sup>4</sup> "Contributed" is the word used in most of the decisions (see *Wilds v. Hudson River R. Co.*, 24 N. Y. 430; S. C., 23 How. Pr. 492; *Johnson v. Hudson River R. Co.*, 20 N. Y. 65, 73; *Button v. Hudson River R. Co.*, 18 N. Y. 248; *Munger v. Tonawanda Co.*, 4 N. Y. 349; *Welling v. Judge*, 40 Barb. 193; *Bowman v. Troy & Boston R. Co.*, 37 Barb. 516; *Mangam v. Brooklyn R. Co.*, 36 Barb. 230; *Bieseigal v. N. Y. Central R. Co.*, 33 Barb. 429; *Clark v. Eighth Av. R. Co.*, 32 Barb. 657; *Willis v. Long Island R. Co.*, Id. 398; *Spooner v. Brooklyn R. Co.*, 31 Barb. 419; *Dascomb v. Buffalo &c. R. Co.*, 27 Barb. 221; *Willetts v. Buffalo R. Co.*, 14 Barb. 585; *Marsh v. N. Y. & Erie R. Co.*, Id. 364; *Talmadge v. Rensselaer &c. R. Co.*, 13 Barb. 493; *Haring v. N. Y. & Erie R. Co.*, Id. 9; *Brand v. Schenectady &c. R. Co.*, 8 Barb. 368; *Barnes v. Cole*, 21 Wend. 188; *Owen v. Hudson River R. Co.*, 2 Bosw. 374; *Delafield v. Union Ferry Co.*, 10 Bosw. 216; *Morris v. Phelps*, 2 Hilt. 38; *Mentges v. Harlem R. Co.*, 1 Hilt. 425; *Clark v. Kirwan*, 4 E. D. Smith, 21; *Witherley v. Regent's Canal Co.*, 12 C. B. [N. S.] 2; *Tuff v. Warman*, 5 C. B. [N. S.] 573; 2 Id. 740; *Walton v. London, Brighton &c. R. Co.*, 1 Harr. & Ruth. 424; *Dowell v. Gen. Steam Nav. Co.*, 5 El. & B. 195; *Ellis v. London & Southwestern R. Co.*, 2 Hurlst. & N. 424; *New Haven Steamboat &c. Co. v. Vanderbilt*, 16 Conn. 420; see also *Michigan &c. R. Co. v. Leahey*, 10 Mich. 193; *West v. Martin*, 31 Mo. 375; *Winship v. Enfield*, 42 N. H. 197; *Drake v. Phil. & Erie R. Co.*, 51 Penn. St. 240; *Little Schuylkill R. Co. v. Norton*, 24 Penn. St. 465; *Noyes v. Morristown*, 1 Verm. 353; *Briggs v. Guilford*, 8 Id. 264; *Murch v. Concord R. Co.*, 9 Foster, 9; *Cleveland, Columbus &c. R. Co. v. Terry*, 8 Ohio St. 570; *Ohio & Miss. R. Co. v. Gullett*, 15 Ind. 487; *Toledo &c. R. Co. v. Goddard*, 25 Ind. 185; *Callahan v. Warne*, 40 Mo. 131). Sometimes the language used

have happened to him,<sup>1</sup> except where the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former party is exposed, to use a proper degree of care to avoid injuring him.<sup>2</sup>

is, that the plaintiff cannot recover if his own negligence *concurrent* (Hance v. Cayuga &c. R. Co., 26 N. Y. 428; Button v. Hudson River R. Co., 18 Id. 248; Cook v. Champlain &c. R. Co., 1 Denio, 91; Burdick v. Worrall, 4 Barb. 596; Owen v. Hudson River R. Co., 7 Bosw. 329; Heil v. Glanding, 42 Penn. St. 493; Penn. R. Co. v. Aspell, 23 Id. 147; Pennsylvania R. Co. v. Zebe, 33 Penn. St. 318), or *co-operated* in producing the injury (Terry v. N. Y. Central R. Co., 22 Barb. 574; Sheffield v. Rochester &c. R. Co., 21 Barb. 339; Clark v. Syracuse &c. R. Co., 11 Barb. 112; Tonawanda R. Co. v. Munger, 5 Denio, 255; Timmons v. Central Ohio R. Co., 6 Ohio St. 105; Kerwhacker v. Cleveland, Columbus &c. R. Co., 3 Id. 172). In other cases, it is said simply that the plaintiff must be without fault (Spencer v. Utica &c. R. Co., 5 Barb. 337; Brown v. Maxwell, 6 Hill, 592), or that, as between the parties, the injury must be caused *solely* by the defendant's fault (Grippen v. N. Y. Central R. Co., 40 N. Y. 34; Bigelow v. Reed, 51 Maine, 325), or that he cannot recover if the injury is the result of the want of ordinary care on the part of both parties (Reeves v. Delaware &c. R. Co., 30 Penn. St. 454; Williams v. Michigan Central R. Co., 2 Mich. 259; Duggins v. Watson, 15 Ark. 118), or that the plaintiff cannot recover, if by the use of ordinary care he might have avoided the injury (Beers v. Housatonic R. Co., 19 Conn. 566; Beatty v. Gilmore, 16 Penn. St. 463; Hassa v. Junger, 15 Wisc. 598). In an action for damages occasioned by collision with a train, it was held, that if by the exercise of ordinary skill and care the plaintiff could have avoided the injury, or if his conduct contributed to produce it, he cannot recover (Runyon v. Central R. Co., 1 Dutch. 556). In Scotland, the same principle has been expressed in various forms (M'Naughton v. Caledonian R. Co., 21 Dunlop, 160; Hay, 260; Davidson v. Monkland R. Co., 17 Dunlop, 1038; Hay, 27; O'Neile v. Neilson, 20 Dunlop, 427; Hay, 299).

These variations of language are of no practical importance, as it will be found that the meaning of the court was substantially the same in each case, and the decisions all stand on one principle, which is, however, best expressed in the word we have used in the text; though it has been criticised as "much too loose," and as "a very unsafe word" (Crompton, J., Tuff v. Warman, 5 C. B. [N. S.] 573, 584).

<sup>1</sup> Wilds v. Hudson River R. Co., 24 N. Y. 430; Thomas v. Kenyon, 1 Daly, 132; Tuff v. Warman, 5 C. B. [N. S.] 573; affirming S. C., 2 Id. 740; see Central R. Co. v. Moore, 4 Zab. 824. In Caswell v. Worth (5 El. & B. 849), it was claimed that one who suffered an injury from an omission to fence machinery as required by statute, could not be prejudiced by his contributory negligence. But the court held that there was no ground for excepting such a case from the general rule.

<sup>2</sup> Tuff v. Warman, 5 C. B. [N. S.] 573; 2 Id. 740; Davies v. Mann, 10 Mees. & W. 546; Scott v. Dublin & Wicklow R. Co., 11 Irish C. L. 377. This qualification of the rule is fully approved in Indiana (Wright v. Brown, 4 Ind. 95; Indianapolis & Cin. R. Co. v. Caldwell, 9 Id. 397; see Lafayette &c. R. Co. v. Adams, 26 Ind. 76), Ohio (Kerwhacker v. Cleveland, Columbus &c. R. Co., 3 Ohio St. 172), Kentucky (Louisville & Nashv. R. Co. v. Collins, 2 Duvall, 114), Missouri (Morrissey v. Wiggins Ferry Co., 43 Mo. 380), Alabama (Foster v. Holly, 38 Ala. [N. S.] 76), and Illinois (Chicago

§ 26. This is, we think, the precise doctrine of law upon this subject, which is supported by the weight of authority, though it is by no means easy to reconcile all the expressions used by the various courts of America and England, in attempting to define the extent to which the contributory negligence of the plaintiff is a bar to his action. There is much inconsistency, not only between the language of courts in different countries or States, but also between the *dicta* of courts in the same State, and even of the same court at different periods.<sup>1</sup> Looking, however, less to what has been *said* than to what has been actually *decided*, it is possible to reduce the cases to comparative harmony: a task in which we may be aided by observing that all the American decisions upon this question have been professedly based upon the English precedents, rather than upon any process of original reasoning; so that if we can ascertain what was the real meaning of the English decisions thus cited, that should have controlling influence. We are aware that the latest English de-

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& R. I. R. Co. v. Still, 19 Ill. 499). So in *Button v. Hudson River R. Co.* (18 N. Y. 248, 258), it was adopted by Harris, J. It seems also to be adopted in Connecticut (*Beers v. Housatonic R. Co.*, 19 Conn. 566). See also *Spofford v. Harlow*, 3 Allen, 176; *Phila. & Reading R. Co. v. Spearen*, 47 Penn. St. 300. But compare *Reeves v. Delaware & c. R. Co.*, 30 Penn. St. 454.

<sup>1</sup> Thus, in *Munger v. Tonawanda R. Co.* (4 N. Y. 349; S. C. previously, 5 Denio, 255), the plaintiff's oxen were run over while trespassing on the defendant's track. The plaintiff offered evidence of negligence on the part of the defendant, which was excluded, and this ruling was affirmed on appeal, the Court of Appeals saying that although the defendant might have avoided the accident by the use of ordinary care, the plaintiff, being a trespasser, could not complain of the defendant's negligence. On the other hand, in *Button v. Hudson River R. Co.* (18 N. Y. 248, 258), Harris, J., concedes that where the defendant might, by the use of reasonable care at the time of the injury, have avoided it, he is liable, notwithstanding the plaintiff remotely contributed by his fault to the injury; and further admits (p. 259), that if the defendant in that case could, by reasonable care, have avoided running over the plaintiff after discovering him on the track (where he was lying drunk), it was liable for doing so. This latter view accords with the doctrine of *Davies v. Mann* (10 Mees. & W. 546), and all the subsequent English cases. The earlier English cases were not clear or consistent upon this point, especially if the language of the judges is considered apart from the actual decisions rendered (see *Vennall v. Garner*, 2 Cr. & M. 21; S. C. 3 Tyrw. 85; *Vanderplank v. Miller*, Moo. & M. 169; *Sills v. Prown*, 9 Carr. & P. 601; *Raisin v. Mitchell*, 9 Carr. & P. 613; *Luck v. Seward*, 4 Carr. & P. 106).

cisions are not necessarily the best exponents in American courts of the earlier cases; but we think that, upon the question of mutual and contributory fault, the English courts have most faithfully comprehended and adhered to the spirit of those earlier decisions whose authority is established among us by the repeated deference of our own tribunals. Their conclusions seem to us so reasonable, and upon the whole so carefully expressed, that we feel no hesitation in relying upon them as furnishing the true rule; especially after the strong support which they have received from several courts in this country.

§ 27. In the first place, it is only the contributory fault of the *injured party*, or of some one whose fault is imputable to him, that can excuse the defendant. The fault of a mere stranger, however much it may contribute to the injury, is no defense for one whose negligence helped to bring the accident about.<sup>1</sup>

§ 28. The plaintiff's right to recover is not affected by his having contributed to his injury, unless he was in *fault* in so doing. It is possible for the plaintiff not only to contribute to, but even to be himself the immediate cause of his own injury, and yet to recover compensation therefor.<sup>2</sup> If his share in the transaction was innocent, and not incautious, it furnishes no excuse for the defendant. Thus where, by the negligence of a railroad company, the train was run into such danger that, in order to escape from greater peril, the plaintiff jumped off, and thus injured

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<sup>1</sup> See *ante*, § 10; *post*, §§ 46, 47, 48, 51; *Brehm v. Great Western R. Co.*, 34 Barb. 256; *Mott v. Hudson River R. Co.*, 8 Bosw. 345; *Lockhart v. Lichtenthaler*, 46 Penn. St. 151; *Sullivan v. Phil. & Reading R. Co.*, 30 Penn. St. 234; *Webster v. Hudson River R. Co.*, 38 N. Y. 161; *Wettor v. Dunk*, 4 Fost. & F. 298; *Harrison v. Great Northern R. Co.*, 3 Hurlst. & C. 231; *Burrows v. March Gas Co.*, Law Rep. 5 Exch. 67.

<sup>2</sup> Where the plaintiff used water in his boilers from his cistern, which the defendant had fouled before it reached the cistern, it was held that, in the absence of evidence that it would have been less expensive to pump the water out than to use it as it was, the plaintiff was not debarred from recovery (*Whaley v. Laing*, 2 Hurlst. & N. 476; 26 Law Jour. [Exch.] 327).

himself, he recovered damages against the company.<sup>1</sup> And the same principle was applied to the case of a plaintiff who was injured while attempting to get off under similar circumstances, although other passengers who sat still were not injured.<sup>2</sup> And upon this principle it is, that no lawful use of his own land, though exposing him to greater risk from the negligence of others than would be the case if a different use were made of it, will deprive any one of a remedy for such negligence.<sup>3</sup> If the defendant has by his own act thrown the plaintiff off his guard, and given him good reason to believe that vigilance was not needed, the lack of such vigilance on the part of the plaintiff is no bar to his claim,<sup>4</sup> especially if the defendant has done so by means of positive misrepresentations.<sup>5</sup>

§ 29. Where the negligence of the plaintiff is relied upon to defeat his recovery, he must have been guilty of at least *ordinary* negligence. His failure to take *unusual*

<sup>1</sup> Stokes v. Saltonstall, 13 Peters, 181; Eldridge v. Long Island R. Co., 1 Sandf. 89; Ingalls v. Bills, 9 Metc. 1; Frink v. Potter, 17 Ill. 406; Southwestern R. Co. v. Pauls, 24 Geo. 356; McKinney v. Neil, 1 McLean, 540.

<sup>2</sup> Buel v. N. Y. Central R. Co., 31 N. Y. 314. In an action by a passenger on board a steamer, for injuries caused by the anchor of the vessel falling on his leg, in consequence of its bad stowage, it being claimed that he was in a part of the vessel where he ought not to have been, Pollock, C. B., said: "The man who is guilty of a wrong, who thereby produces mischief to another, has no right to say 'part of that mischief would not have arisen if you had not yourself been guilty of some negligence;' and I think that, when the negligence did not in any degree contribute to the immediate cause of the accident, negligence ought not to be set up as an answer to the action" (Greenland v. Chaplin, 5 Exch. 243). In another case, the plaintiff was injured while working in a coal mine, in consequence of the using of insufficient machinery by the defendants,—Held, that although the plaintiff was out of his place contrary to the rules of the work, and that in consequence of this alone he was in a position to be injured, yet this was no defense to the masters using insufficient machinery. They were bound to have it sufficient; and if, by not having it so, injury resulted to any one, the defendants were liable (Whitelaw v. Pollock, Hay, 112; 12 D. B. M. 434).

<sup>3</sup> Cook v. Champlain &c. Co., 1 Denio, 91; Vaughan v. Taff Vale R. Co., 3 Hurlst. & N. 743; see Fero v. Buffalo &c. R. Co., 22 N. Y. 209.

<sup>4</sup> Pennsylvania R. Co. v. Ogier, 35 Penn. St. 60; Ernst v. Hudson River R. Co., 35 N. Y. 9, 28; Paterson v. Wallace, 1 Macq. H. L. 748.

<sup>5</sup> Hutchinson v. Guion, 5 C. B. [N. S.] 149.



care is no defense to the action.<sup>1</sup> This seems to be an invariable rule, because every man is bound, no matter in what he may be engaged, to use ordinary care for his own protection, and no man is ever bound to use more. Therefore, although a gratuitous bailee is only required to use *slight* care to preserve the bailor's property from harm, he cannot hold the bailor liable for injuries which he suffers from the property through his own want of *ordinary* care. So, a borrower, although bound to use great care for the preservation of the thing lent, is not bound to show more than ordinary care on his part, in an action by him against the lender for injury caused by the thing lent. The special relation existing in each of these cases, though modifying the liability of the defendant in respect to his own degree of care, has no effect upon the natural duty of the plaintiff to take ordinary care of himself.

§ 30. Ordinary care, however, as the phrase is here used, implies the use of such watchfulness and precautions as are fairly proportioned to the danger to be avoided, judged by the standard of common prudence and experience.<sup>2</sup> If the danger is remote or slight, the care required

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<sup>1</sup> So it has been repeatedly adjudged, in cases involving the risk of life and limb (*Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 26; *Beisiegel v. N. Y. Central R. Co.*, 34 N. Y. 622, 628, 632; *Fero v. Buffalo &c. R. Co.*, 22 N. Y. 209; *Cook v. N. Y. Central R. Co.*, 3 *Keyes*, 476; *Johnson v. Hudson River R. Co.*, 6 *Duer*, 633, 645; affirmed, 20 N. Y. 65; *McGrath v. Hudson River R. Co.*, 32 *Barb.* 144; *Willis v. Long Island R. Co.*, *Id.* 398; *Center v. Finney*, 17 *Barb.* 94; affirmed, 2 *Seld. Notes*, 44; *Eakin v. Brown*, 1 *E. D. Smith*, 36; *Beers v. Housatonic R. Co.*, 19 *Conn.* 566; *Bequette v. People's Tr. Co.*, 2 *Oregon*, 200), as well as in cases involving injury to property only (*Newbold v. Mead*, 57 *Penn. St.* 487; *Davies v. Mann*, 10 *M. & W.* 546; *Bridge v. Grand Junc. R. Co.*, 3 *Id.* 244; *Thorogood v. Bryan*, 8 *C. B.* 115; *Clayards v. Dethick*, 12 *Q. B.* 439; *Butterfield v. Forrester*, 11 *East*, 60; *Whirley v. Whiteman*, 1 *Head*, 610). The words "ordinary care" are used in this connection in *Munger v. Tonawanda R. Co.*, 4 *N. Y.* 349; 5 *Den.* 255; *Garmon v. Bangor*, 38 *Maine*, 443; *Owings v. Jones*, 9 *Md.* 108; *Davies v. Mann*, 10 *M. & W.* 546; *Bridge v. Grand Junc. R. Co.*, 3 *Id.* 244; *Butterfield v. Forrester*, 11 *East*, 60.

<sup>2</sup> *Grippen v. N. Y. Central R. Co.*, 40 *N. Y.* 34, 42; *Mackey v. N. Y. Central R. Co.*, 27 *Barb.* 528, 542; *Toledo &c. R. Co. v. Goddard*, 25 *Ind.* 185. Ordinary care has been defined, with especial reference to the doctrine of contributory negligence, as "that degree of care which persons of ordinary care and prudence are accustomed

to avoid it may be slight. If the danger is near and extraordinary, extraordinary care and vigilance should be used to avoid it, because such would be the natural course of a prudent man. So a person who is old or infirm would be guilty of culpable negligence in taking risks which might very properly be assumed by a young, healthy, and vigorous person. But as, in questions relating to contributory negligence, it is always the plaintiff's own person or property concerning which negligence is imputed to him, if at all, and the defendant must be in fault in order to raise the question, the plaintiff is not required to exercise more care than is usual, under similar circumstances, among careful persons of the class to which he belongs,<sup>1</sup> if that class is numerous enough to have a well-recognized existence, and is one which reasonably informed men must be aware may be commonly exposed to injuries similar to that upon which the action is founded.<sup>2</sup>

§ 31. As there is a natural presumption that every one will act with due care,<sup>3</sup> it cannot be imputed to the plaintiff as negligence that he did not anticipate culpable negligence on the part of the defendant.<sup>4</sup> He has a right to as-

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to use and employ, under the same or similar circumstances, \* \* \* having due regard to the rights of others and the objects to be accomplished" (Cleveland &c. R. Co. v. Terry, 8 Ohio St. 570, 581). Thus, one who passes along an obstructed highway, "is bound to observe ordinary care," that is, such care as a reasonably prudent man, under the peculiar circumstances of the case, would exercise to preserve himself and property from injury (Pennsylvania R. Co. v. McTighe, 46 Penn. St. 316).

<sup>1</sup> Mackay v. N. Y. Central R. Co., 35 N. Y. 75, 80; Paterson v. Wallace, 1 Macq. H. L. 748. To the contrary, however, is Tucker v. Henniker, 41 N. H. 317.

<sup>2</sup> This qualification is our own, but we think clearly just. A New York railroad company ought not to be obliged to anticipate any negligence peculiar to Chinese, while in California it might reasonably be required of railroad officers that they should do so.

<sup>3</sup> The Mangerton, 1 Swabey, 120; Vennall v. Garner, 1 Cr. & M. 21.

<sup>4</sup> Newson v. N. Y. Central R. Co., 29 N. Y. 383, 391; Ernst v. Hudson River R. Co., 35 N. Y. 9, 35; Barton v. Syracuse, 37 Barb. 292, 299; Fox v. Sackett, 10 Allen, 535; Carroll v. New Haven R. Co., 1 Duer, 571; Reeves v. Delaware, Lack. & W. R. Co., 30 Penn. St. 454; see Colegrove v. New Haven R. Co., 6 Duer, 382; aff'd, 20 N. Y. 492; Owen v. Hudson River R. Co., 35 N. Y. 516, 518, per Peckham, J.;

sume that every one else will obey the law and to act upon that belief.<sup>1</sup> Nor even where the plaintiff sees that the defendant has been negligent, is he bound to anticipate all the perils to which he may *possibly* be exposed by such negligence, or even to refrain absolutely from pursuing his usual course on account of risks to which he is *probably* exposed by the defendant's fault. Some risks are taken by the most prudent men; and the plaintiff is not debarred from recovery for his injury, if he has adopted the course which most prudent men would take under similar circumstances.<sup>2</sup>

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Harpell v. Curtiss, 1 E. D. Smith, 78; Seward v. Milford, 21 Wisc. 485. The same principle is perhaps involved in Cook v. Champlain &c. Co. (1 Denio, 91), where it was held that negligence could not be imputed to the plaintiff by reason of his building upon an exposed position on his own land, since no one could injure it without negligence.

<sup>1</sup> Beisiegel v. N. Y. Central R. Co., 34 N. Y. 622; Philadelphia R. Co. v. Hagan, 47 Penn. St. 244; Jetter v. N. Y. & Harlem R. Co., 2 Keyes, 154; Vennall v. Garner, 1 Cr. & M. 21; The Mangerton, 1 Swabey, 120.

<sup>2</sup> See Reeves v. Delaware &c. R. Co., 30 Penn. St. 454. The defendant is not necessarily excused, merely because the plaintiff knew that some danger existed through the defendant's neglect, and voluntarily incurred such danger. The amount of danger and the circumstances which led the plaintiff to incur it, are for the consideration of a jury (Clayards v. Dethick, 12 Q. B. 439). Therefore, where the plaintiff, in full view of obstructions left in the road by the negligence of the defendants, attempted to lead his horse over them, and the horse fell and was killed, it was held to be a question for the jury, whether the plaintiff was culpably negligent or not (Ib.) Where a traveler crossed a bridge which he knew to be somewhat unsafe, but which the county officers had not closed, nor warned people not to pass, it was held that he was not in fault, and could recover for injuries sustained thereby (Humphreys v. Armstrong Co., 56 Penn. St. 204). So where the car on which the plaintiff was a passenger stopped short of the platform, and she was injured by jumping out, a verdict in her favor was nevertheless sustained (Foy v. London, Brighton &c. R. Co., 18 C. B. [N. S.] 225). So in Pennsylvania it has been held that a traveler, whose path is wrongfully impeded by a railroad train standing across it, may recover for injuries suffered in attempting to cross the train (Rauch v. Lloyd, 31 Penn. St. 358). But the contrary is held in Massachusetts (Gahagan v. Boston & Lowell R. Co., 1 Allen, 187; and see Wyatt v. Great Western R. Co., 6 Best & S. 709). Where a miner was killed in a coal pit by the falling of part of the roof, and the other workmen had warned him against working, but he had kept on till he met his death, held that no action lay (Cook v. Bell, 20 D. P. 137; 30 Jur. 75; Hay, 283). And, in another case, the plaintiff was injured in consequence of the falling in of the roof of an excavation in a mine in which he was working. It was the duty of the workmen to attend to the propping up of these places, the defendants finding the materials for it. The plaintiff was aware that there was danger of

§ 32. Neither is the plaintiff's negligence, or other fault, of any importance, if it did not contribute to bring upon him the injury of which he complains,<sup>1</sup> nor, it has been said, unless it *substantially* contributed to the injury.<sup>2</sup> The defendant is not excused by any negligence of the plaintiff, which does not amount to a want of ordinary care on the part of the latter, in avoiding the consequences of the defendant's negligence.<sup>3</sup> His negligence must not only concur in the transaction, but must co-operate in causing

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the falling of this roof, but not finding props at hand, he continued his work, and was injured in consequence. Held, that the defendants were not liable, inasmuch as the plaintiff had continued working in the face of a "seen danger," when his proper course would have been to cease work (*McNeill v. Wallace*, 15 Dunlop, 818; 25 Jur. 492; Hay, 168).

<sup>1</sup> *Savage v. Corn Exchange Ins. Co.*, 36 N. Y. 655; affirming S. C., 4 Bosw. 1; *Morrison v. General Steam Nav. Co.*, 8 Exch. 733; *Norris v. Litchfield*, 35 N. H. 271; *Alger v. Lowell*, 3 Allen, 402; *Churchill v. Rosebeck*, 15 Conn. 359. Thus, in a case of collision between two vessels, it appeared that the plaintiff's vessel was without a helmsman at the time of the accident, it being towed by a steamer. The judge charged that, if the want of a helmsman did not contribute to the injury, it was of no consequence,—held, on appeal, a proper instruction (*Haley v. Earle*, 30 N. Y. 208). So in an action for damages caused by a defect in the road, the fact that the plaintiff was intoxicated while driving at the time of the accident is unimportant, if his intoxication did not contribute to the injury (*Alger v. Lowell*, 3 Allen, 402; *Robinson v. Pioche*, 5 Cal. 460). And where the plaintiff had been injured by noxious vapors created by the defendant, the fact that the plaintiff himself created other bad odors upon his own land was held to be immaterial, there being nothing to show that the injury suffered by the plaintiff from the defendant's vapors was in any degree owing to the union of the two different odors or gases, or that the damage complained of was aggravated by the gases arising upon the plaintiff's land (*Brown v. Illius*, 27 Conn. 84).

<sup>2</sup> *Daley v. Norwich &c. R. Co.*, 26 Conn. 591; *New Haven Steamboat &c. Co. v. Vanderbilt*, 16 Conn. 420; *West v. Martin*, 31 Mo. 375. The only objection to this phrase is, that, although technically correct, its use in a charge might mislead a jury. Where the question is fairly presented by the evidence, it would be very proper to tell the jury that the plaintiff is not to be barred from recovering by any fault which has not had any substantial share in exposing him to injury; but, in ordinary cases, it would be better to omit such a qualification of the usual instructions. In *Grippen v. N. Y. Central R. Co.* (40 N. Y. 34), an instruction to the jury that the injury must be "*essentially*" caused by the defendant's fault, was held erroneous, and the judgment reversed, for the refusal of the judge to use the word "*solely*" instead.

<sup>3</sup> *Brown v. N. Y. Central R. Co.*, 31 Barb. 385; affirmed, 32 N. Y. 597; *Davies v. Mann*, 10 Mees. & W. 546; *Bridge v. Grand Junc. R. Co.*, 3 M. & W. 244.

the injury, or in exposing him or his property to it.<sup>1</sup> If the injury would certainly have occurred, notwithstanding the exercise of due care by the plaintiff, his omission to take such care is immaterial.<sup>2</sup> Negligence on the part of the plaintiff, tending merely to increase the damage suffered by him, is no bar to his action.<sup>3</sup> How far such negligence may be considered in reduction of damages, is a subject that will be discussed in our chapter on DAMAGES.<sup>4</sup>

§ 33. The plaintiff's fault must also *proximately* contribute to his injury, in order to constitute any ground of defense;<sup>5</sup> but it is not necessary that it should *directly*

<sup>1</sup> It has even been held that the defendant was not excused by any negligence on the part of the plaintiff, which did not tend to bring about the act or occurrence which directly caused the injury (*Carroll v. New Haven R. Co.*, 1 Duer, 571). But this language seems to go too far; and where the judge charged, in a case of collision, that the plaintiff's fault did not excuse the defendant, "unless it had the effect to produce the collision," the New York Court of Appeals unanimously held this to be a wrong direction (*Colegrove v. New Haven R. Co.*, 20 N. Y. 492). In *Greenland v. Chaplin* (5 Exch. 243, 248), Pollock, C. B., said: "I think that where the negligence of the party injured did not in any degree contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action."

<sup>2</sup> *Thomas v. Kenyon*, 1 Daly, 132; *Short v. Knapp*, 2 Daly, 150; *Wright v. Illinois &c. R. Co.*, 20 Iowa, 195; *Beers v. Housatonic R. Co.*, 19 Conn. 566; see *Colegrove v. New Haven R. Co.*, 6 Duer, 382; affirmed, 20 N. Y. 492; *Tuff v. Warman*, 5 C. B. [N. S.] 573; affirming S. C., 2 Id. 740; *McGuire v. Hudson River R. Co.*, 2 Daly, 76.

<sup>3</sup> *Greenland v. Chaplin*, 5 Exch. 243; *Thomas v. Kenyon*, 1 Daly, 132. In the latter case, the doctrine was stated to be that, where the effect of the negligence of one party is to produce a certain amount of injury, even if the other party had been guilty of no negligence at all, then, though the negligence of the other party may have rendered the loss or injury greater than it would otherwise have been, still they are not the joint authors of all that has taken place; and it is possible to distinguish the amount of injury caused by the negligence of the one from the amount caused by the negligence of the other. Daly, J., said: "The mutual or co-operating negligence which deprives one party of any right of action against the other, is where the act which produced the injury would not have occurred but for the combined negligence of both. There may be mutual negligence, and yet one party have a right of action against the other." And so if a man negligently lie down and fall asleep in the middle of a public road, and another, seeing him, and failing to exercise ordinary care, should drive over him, the injured party would have a right of action (*Kerwhacker v. Cleveland &c. R. Co.*, 3 Ohio St. 172; *Trow v. Vermont Central R. Co.*, 24 Verm. 494; *Davies v. Mann*, 10 Mees. & W. 545; *Butterfield v. Forrester*, 10 East, 60).

<sup>4</sup> See *post*, §§ 35, 598.

<sup>5</sup> *Tuff v. Warman*, 2 C. B. [N. S.] 740, 757, per Willes, J.; *Isbell v. N. Y. & N. H. R. Co.*, 27 Conn. 393; *Richmond v. Sacramento &c. R. Co.*, 18 Cal. 351; *Cleveland*,

contribute to such injury.<sup>1</sup> "Proximate" does not mean next or near in the order of time, but near in the order of causation; and although two events which are next in the latter order are usually next in the former also, they are not always so.<sup>2</sup> Thus, where a trespasser enters an inclosure, some time may elapse before he is injured, yet if the injury was in part the consequence of his being on the premises, his wrongful entry may be properly described as a proximate cause of the injury.<sup>3</sup>

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Columbus &c. R. Co. v. Elliott, 4 Ohio St. 474; Indianapolis & Cincinnati R. Co. v. Caldwell, 9 Ind. 397; Meyer v. People's R. Co., 43 Mo. 523; see Button v. N. Y. Central R. Co., 18 N. Y. 248, 258, per Harris, J.; Witherley v. Regent's Canal Co., 12 C. B. [N. S.] 2, per Byles, J. In Trow v. Vermont Central R. Co. (24 Verm. 487), it was held that remote negligence on the part of the plaintiff was a bar to an action for remote negligence of the defendant, but not to an action for his proximate negligence. It may, however, be doubted whether the words were not misapplied in that case. The action was for the value of a horse injured by the defendant's engine, in consequence of the defendant's neglect to fence its road. It was held that the plaintiff could not recover, because he had allowed the horse to remain on the highway, exposed to the danger after he had notice thereof.

<sup>1</sup> Button v. Hudson River R. Co., 18 N. Y. 248. Nevertheless, where the only negligence with which the plaintiff is charged is such as operated *directly*, if at all, to produce the injury, a new trial will not be granted on account of the judge's charging the jury that they must find for the plaintiff upon this issue, unless his negligence operated directly to produce the injury (Johnson v. Hudson River R. Co., 20 N. Y. 65; Tuff v. Warman, 5 C. B. [N. S.] 573; 2 Id. 740). In McNaughton v. Caledonian R. Co. (21 Dunlop, 160; 31 Jur. 94; Hay, 260), it was held that where the fault of the deceased *essentially or directly* contributed to the accident that led to his death, damages are not recoverable from another person who may have partly contributed to the injury or death. In Norris v. Litchfield (35 N. H. 271), the court says that the plaintiff's wrongful act must have *directly* contributed to the injury, in order to excuse the defendant. But the facts of the case did not require such a broad proposition, and the decision is only authority for requiring that the plaintiff's act should *proximately* so contribute. The same language is used in The Farmer v. McCraw (26 Ala. 189), and in Cleveland, Columbus &c. R. Co. v. Terry (8 Ohio St. 570).

<sup>2</sup> See *ante*, §§ 9, 10.

<sup>3</sup> In an action against a railroad company for the negligent killing of animals, the court instructed the jury that "proximate negligence is negligence at the time of the happening of the injury complained of," that "remote negligence is that which does not occur at the time of such injury," that in the opinion of the court, "the plaintiff, in suffering his animals to run at large in the vicinity of the railroad, was only guilty of remote negligence," and that if the defendant was guilty of gross negligence, the latter was liable for the damage. Held, that the instruction was erroneous, and that the plaintiff's right to recover depended upon the degree of negligence on his part contributing to the injury, as well as upon the time of its happening (Chicago &c. R. Co. v. Goss, 17 Wisc. 428).

§ 34. It is not essential to this defense that the plaintiff should have been, in any degree, the cause of the act by which he was injured.<sup>1</sup> It is enough to defeat him, if the injury might have been avoided by his exercise of ordinary care. The question to be determined in every case is, not whether the plaintiff's negligence *caused*, but whether it *contributed* to the injury of which he complains.<sup>2</sup> This he may do by exposing himself to the risk of injury, quite as effectually as by committing the very act which injures him. Neither is it necessary that the plaintiff's negligence should have contributed to the injury in any greater degree than the negligence of the defendant.<sup>3</sup>

§ 35. Where the plaintiff, by his own fault, aggravates his injury, and increases the extent of his damage, but has not actually contributed to the whole injury which he has suffered, he is entitled to recover to the extent of the damage which he has suffered without his fault, but not for that portion of the damage to which he has thus contributed.<sup>4</sup> Thus, if a grazier should employ two servants

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<sup>1</sup> *Colegrove v. New Haven R. Co.*, 20 N. Y. 492.

<sup>2</sup> *Brand v. Schenectady &c. R. Co.*, 8 Barb. 368.

<sup>3</sup> This is well settled in most of the United States and in England (*Wilds v. Hudson River R. Co.*, 24 N. Y. 430; *Bigelow v. Reed*, 51 Maine, 325; *Grippen v. N. Y. Central R. Co.*, 40 N. Y. 34; *Hoben v. Burlington &c. R. Co.*, 20 Iowa, 562. See notes to § 37.)

<sup>4</sup> *Sherman v. Fall River Iron Works Co.*, 2 Allen, 524; *Hunt v. Lowell Gaslight Co.*, 1 Allen, 343; *Chase v. N. Y. Central R. Co.*, 24 Barb. 278; *Thomas v. Kenyon*, 1 Daly, 132; *Wright v. Illinois &c. R. Co.*, 20 Iowa, 195. See *supra*, § 28, note 2; and *post*, § 598. Compare, however, *Greenland v. Chaplin* (5 Exch. 243, 247), where *Pollock, C. B.*, says: "I entirely concur with the rest of the court, that a person who is guilty of negligence, and thereby produces injury to another, has no right to say, 'Part of that mischief would not have arisen, if you yourself had not been guilty of some negligence.'" So, in *Teall v. Barton* (40 Barb. 137, 143), *Johnson, J.*, says: "Where the most that can be said is, that the plaintiff did not exercise the necessary watchfulness and skill to ward off the unlawful blow, this is no answer, either in bar, or in mitigation." This does not seem to be consistent with the doctrine of many other cases, to the effect that the negligence which deprives a party injured from recovering, consists in his failure to use due care in avoiding the consequences of the other party's negligence (*supra*, § 32).

to drive the same flock of sheep, one of whom should drive carefully, and the other carelessly, and the whole flock should be run over by the negligence of a stranger, the owner could recover for such of the flock as were driven with care, although the rest might have been precipitated into danger by the negligence of the other driver.

§ 36. According to the doctrine of the English decisions, which we have adopted in section 25, the plaintiff may recover, notwithstanding his own negligence exposed him to the risk of injury, if the defendant, after becoming aware of the plaintiff's danger, failed to use ordinary care to avoid injuring him.<sup>1</sup> Thus, if one negligently leaves an

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<sup>1</sup> *Tuff v. Warman*, 5 C. B. [N. S.] 573; 2 Id. 740; *Davies v. Mann*, 10 Mees. & W. 546; *Scott v. Dublin & Wicklow R. Co.*, 11 Irish C. L. 377; *Kerwhacker v. Cleveland &c. R. Co.*, 3 Ohio St. 172; *Wright v. Brown*, 4 Ind. 95; *Louisville & Nashv. R. Co. v. Collins*, 2 Duvall, 116; *Macon &c. R. Co. v. Davis*, 18 Geo. 679; *Aycock v. Wilmington &c. R. Co.*, 6 Jones' [N. C.] Law, 231; *East Tennessee &c. R. Co. v. St. John*, 5 Sneed, 524; *Balcom v. Dubuque &c. R. Co.*, 21 Iowa, 102; *Morrissey v. Wiggins Ferry Co.*, 43 Mo. 380; see *Button v. Hudson River R. Co.*, 18 N. Y. 248, 258, per Harris J.; *Trow v. Vermont Cent. R. Co.*, 24 Verm. 487; *Lovett v. Salem &c. R. Co.*, 9 Allen, 557; *Spofford v. Harlow*, 3 Id. 176; *Foster v. Holly*, 38 Ala. [N. S.] 76; *post*, § 493. "Neither has the right, because the other has omitted to use due care, to cease the use of efforts on his part to avoid occasioning injury to the other. That would be to permit the party guilty of the first negligence to be wantonly killed by the other. The parties must be held, on both sides, to the use of every reasonable effort to avoid such a result" (*Chicago & R. I. R. Co. v. Still*, 19 Ill. 499, 508). But in Pennsylvania, Woodward, J., referring to *Beers v. Housatonic R. Co.* (19 Conn. 566), said: "The ruling there was, that if the plaintiff could not, by the exercise of ordinary care, have avoided the injury, the want of such care on his part would not preclude him from recovery. Such a mode of stating the rule involves the solution of a most difficult problem; for who is to say that an injury resulting from an actual want of ordinary care, on the part of two parties engaged in different occupations at the same time and place, would certainly have resulted from the want of ordinary care of only one of those parties? I prefer our own mode of holding the law: that if the injury result from the want of ordinary care of both parties, neither has remedy against the other; but if it be not in any degree ascribable to the negligence of one party—due regard being had to all the circumstances of his position—he may have redress from the other" (*Reeves v. Delaware, Lackawana &c. R. Co.*, 30 Penn. St. 454). But in that case, the decision was in favor of the plaintiff, and we think that the doctrine of the text is substantially accepted in Pennsylvania (see *Philadelphia and Reading R. Co. v. Spearen*, 47 Penn. St. 300). In New York, the doctrine of our text has been very generally overlooked,



animal belonging to him on the highway, though he cannot recover from one who injures it through a negligent failure to look out for any thing of the kind, he may recover from one, who, seeing it, does not use proper care to avoid running over it.<sup>1</sup> So, if a vessel fails to exhibit proper lights, and to take the proper side of the channel, this will be a sufficient answer to an action against one who negligently runs into the vessel before he sees it, or after it is too late to avoid a collision; but it is no defense in favor of one who, having warning, fails to use proper care to avoid doing an injury.<sup>2</sup> So if a railroad engineer sees persons or property on the track, he must check his train, and do his best to avoid a collision.<sup>3</sup> The American cases, in which a contrary opinion is expressed, will be found, upon analyzing them, to be cases in which the negligence of the defendant consisted merely in not foreseeing the negligence of the

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especially in the courts of original jurisdiction. It has rarely been mentioned as a qualification of the general rule of nonliability where the plaintiff's negligence has contributed to his injury. Some recent decisions at trial terms have therefore gone to intolerable lengths, the judges being logically compelled to accept results, from which their own common sense must have shrunk. Thus, where it was clearly, proved that an express wagon, overloaded with loose boxes, was driven at a reckless speed through a crowded street, and, whirling round a corner, struck a lamp-post, so that one of the boxes was thrown out, and fell upon a child six years old, *on the sidewalk*, a nonsuit was granted, on the ground that the child's presence in the street, unattended, was contributory negligence.

<sup>1</sup> *Davies v. Mann*, 10 Mees. & W. 546; *Kerwhacker v. Cleveland &c. R. Co.*, 3 Ohio St. 172; *Card v. N. Y. & Harlem R. Co.*, 50 Barb. 39.

<sup>2</sup> *Tuff v. Warman*, 5 C. B. [N. S.] 573; 2 Id. 740; see *Foster v. Holly*, 38 Ala. [N. S.] 76. In a very recent case in New York, it was held that railroad companies have no right to run their trains upon the assumption that travelers on a highway which the railroad crosses will always be prudent and careful. On the contrary, such companies have good reason to presume that persons crossing the highway will frequently be negligent, and, therefore, they should, in view of such a well-known fact, observe the greater precaution. They must govern themselves by the actual facts; and, if an engineer observes a drove of cows upon the railroad, whether properly or improperly or negligently there, he should indulge in no presumptions that they are properly attended, and will be driven off in abundant season to escape collision with the engine, but should exercise a degree of care and precaution proportioned to the impending danger and the probabilities of a collision (*Card v. New York & Harlem R. Co.*, 50 Barb. 39).

<sup>3</sup> *Illinois Cent. R. Co. v. Middlesworth*, 46 Ill. 494; *Chicago &c. R. Co. v. Hogarth*, 38 Ill. 370; *Kerwhacker v. Cleveland &c. R. Co.*, 3 Ohio St. 172.

plaintiff; for which, as we have already shown, the defendant is not responsible.

§ 37. It has been held, in some cases,<sup>1</sup> that the plaintiff's slight or ordinary negligence is no defense, where the defendant has been guilty of *gross* negligence.<sup>1</sup> But this exception to the rule was in part founded upon the idea that gross negligence was equivalent to fraud or malice,<sup>2</sup> which we have already shown to be contrary to both principle and authority.<sup>3</sup> And it is now generally held, in the most important courts of America, that the degree of the defendant's negligence is immaterial, in determining questions of contributory negligence.<sup>4</sup> Where the defendant has *willfully* committed an injury, the rule is different;<sup>5</sup> but that is a matter not within our province. Those courts which hold that a defendant, guilty of gross negligence, is not absolved from liability by the plaintiff's contributory negligence, are very careful to limit this doctrine to cases in which the plaintiff is *much less* culpable than the defendant.<sup>6</sup>

<sup>1</sup> Kerwhacker v. Cleveland &c. R. Co., 3 Ohio St. 172; Galena &c. R. Co. v. Jacobs, 20 Ill. 478; Illinois &c. R. Co. v. Goodwin, 30 Id. 117; Illinois Cent. R. Co. v. Middlesworth, 43 Ill. 64; Chicago & Alton R. Co. v. Gretzner, 46 Ill. 75; St. Louis &c. R. Co. v. Todd, 36 Ill. 409; Macon &c. R. Co. v. Davis, 27 Geo. 113; Augusta &c. R. Co. v. McElmurry, 24 Id. 75; see Hartfield v. Roper, 21 Wend. 615; per Harris, J., Button v. Hudson River R. Co., 18 N. Y. 248; Rathbun v. Payne, 19 Wend. 399; per Johnson, C. J., Chapman v. New Haven R. Co., 19 N. Y. 341; Chicago, B. & Q. R. Co. v. Dewey, 26 Ill. 255; Stacke v. Milwaukee &c. R. Co., 9 Wisc. 202; Whirley v. Whiteman, 1 Head, 610. Thus, in Evansville & Crawford R. Co. v. Lowdermilk (15 Ind. 120), the court charged, that if the defendant's negligence had been gross, so as to imply a willingness to commit the injury, a recovery could be had, although the deceased had been negligent. The same language is used in Lafayette &c. R. Co. v. Adams, 26 Ind. 76. And in St. Louis &c. R. Co. v. Todd (36 Ill. 409), it was held that the injury must have been willful on the part of the defendant, in order to make it liable, when the plaintiff had also been negligent.

<sup>2</sup> See Chapman v. New Haven R. Co., 19 N. Y. 341.

<sup>3</sup> *Ante*, § 3.

<sup>4</sup> Wilds v. Hudson River R. Co., 24 N. Y. 430; 23 How. Pr. 492; rev'g S. C., 33 Barb. 503; Grippen v. N. Y. Central R. Co., 40 N. Y. 34, 51; Mangam v. Brooklyn R. Co., 36 Barb. 230; affirmed, 38 N. Y. 455; Neal v. Gillett, 23 Conn. 437; Catawissa R. Co. v. Armstrong, 49 Penn. St. 186; Cunningham v. Lyness, 22 Wisc. 245.

<sup>5</sup> Sanford v. Eighth Ave. R. Co., 23 N. Y. 343; Bird v. Holbrook, 4 Bing. 628; see Tonawanda R. Co. v. Munger, 5 Denio, 255.

<sup>6</sup> Peoria Bridge Asso. v. Loomis, 20 Ill. 235.

And it is universally conceded, in the language of a Vermont decision,<sup>1</sup> that "in cases of mutual neglect, where it is of the same character and degree, no action can be sustained."<sup>2</sup> Indeed, we think that there is no case, in which it has been held that ordinary negligence on the part of the plaintiff did not excuse gross negligence on the part of the defendant, in which the facts did not entitle the plaintiff to recover upon the basis of the English doctrine, as we have stated it in section 36, with perhaps this difference, that the defendant has been held liable for an injury which might have been avoided if he had used ordinary care to ascertain the danger into which the plaintiff had fallen by contributory negligence.<sup>3</sup>

§ 38. The mere fact that the plaintiff, when he suffered the injury, was technically trespassing on the defendant's land, does not deprive him of all remedy for the defendant's negligence, if his trespass does not involve negligence on his own part, substantially contributing to his injury;<sup>4</sup> but if the plaintiff's trespass exposes him to injury, the gen-

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<sup>1</sup> *Trow v. Vermont Central R. Co.*, 24 Verm. 487, 496.

<sup>2</sup> So, it is frequently said, that a plaintiff, equally in fault with the defendant, cannot recover (*Aurora R. Co. v. Grimes*, 13 Ill. 585; *Macon &c. R. Co. v. Winn*, 19 Geo. 440).

<sup>3</sup> This will be found to be true in respect to all the Illinois cases, so far as we have examined them. And this is the whole ground upon which gross negligence was predicated in *Lafayette &c. R. Co. v. Adams*, 26 Ind. 76.

<sup>4</sup> *Daley v. Norwich &c. R. Co.*, 26 Conn. 591; *Birge v. Gardiner*, 19 Id. 507; *Brown v. Lynn*, 31 Penn. St. 510. The defendant was proprietor of an unfinished house, in which there was a sunk flat beneath the level of the street. On a dark night, the plaintiff while passing stepped aside into the door or entry of the building for a necessary purpose, and there being no fence or barrier across it, fell into the sunk flat and broke her thigh bone. Held, that the defendant was liable (*Chapman v. Parlance*, 3 S. D. 585; *Hay*, 29). The plaintiff, being extensively engaged in business at different places along the line of a railway, was in the habit of getting out of the trains at various stations, and afterward proceeding with different ones. While traveling on one, he was injured by a collision, and brought his action against the railroad company, who pleaded that he was not a passenger in the meaning of the company's acts and by-laws, he not having had a ticket. Held, that the company was liable, he not being in the train without a ticket feloniously or fraudulently (*Hamilton v. Caledonian R. Co.*, 29 Jur. 456; 19 Dunlop, 457; *Hay*, 260). In *Loomis v. Terry* (17 Wend. 496), the plaintiff's son, while trespassing in the defendant's woods, in the day time, but without any evil intention, was severely bitten by two

eral rule as to contributory fault applies to prevent his recovering damages.<sup>1</sup>

§ 39. The plaintiff must not only be free from ordinary negligence, but must have been free from any unlawful conduct, in relation to the transaction which forms the basis of the action, and exposing him to the risk of injury. In Massachusetts it is a settled rule, under this principle, that one who, in violation of law, travels on Sunday, cannot recover for injuries suffered from obstacles or defects in the road;<sup>2</sup> but we are not aware that this application of the general doctrine has been sanctioned by the courts of any other state.<sup>3</sup>

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ferocious dogs of the defendant, who was held liable for the damage. So in *Sawyer v. Jackson* (5 N. Y. Leg. Obs. 380), the defendant was held liable for an injury inflicted by his dog upon a boy who came into defendant's premises in the day time in pursuit of a ball; and this although the defendant had put up a notice to "beware of the dog," which however the boy had not seen. There is a difference between these cases and that of *Bird v. Holbrook* (4 Bing. 628), upon the authority of which they were in a great measure decided. There the defendant had put spring guns in the ground, for the obvious purpose of injuring trespassers. Not having put up any notice of warning, he was held liable to a trespasser injured by one of these guns. But that was not a case of negligence, except in omitting to give warning. The gun was intended to do that which it did, and its explosion was as much the willful act of the defendant as if he had fired it with his own hands. In *Townsend v. Wathen* (9 East, 277), it appeared that the defendant set traps in his wood, baited with strong-scented meat, so near the plaintiff's yard that his dogs could smell the meat without entering the wood. The wood being uninclosed and intersected with roads and paths, the plaintiff's dogs entered it, attracted by the meat, and were caught in the traps. It was held that the plaintiff could recover, notwithstanding his dogs were trespassers.

<sup>1</sup> *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; *Lygo v. Newbold*, 9 Exch. 302; *Galena &c. R. Co. v. Jacobs*, 20 Ill. 478; *Blyth v. Topham*, Cro. Jac. 158. In *Bush v. Brainard* (1 Cow. 78), the defendant making maple sugar, carelessly left a bucket of syrup in some open woodland, of which the plaintiff's cow, then running at large, drank, and it caused her death. Defendant knew that the plaintiff's cattle ran at large, but had never given his permission for them to wander on his land. Held, that defendant was not liable, for the reason that the cow ought not to have been where it was when injured, and the plaintiff could not be said to be free from culpable negligence on his part.

<sup>2</sup> *Jones v. Andover*, 10 Allen, 18; *Bosworth v. Swansey*, 10 Metc. 353; and see *post*, § 412.

<sup>3</sup> The question was raised in New York, but not decided (see *Carolus v. Mayor of New York*, 6 Bosw. 15). And it is there held, that though a contract of hiring made on Sunday is illegal, and the hire cannot be recovered, yet if the hirer willfully injures the property, or suffers it to be injured through his negligence, he is liable for

§ 40. The general rule has been enforced in a multitude of adjudged cases, a full account of which belongs to other portions of this work;<sup>1</sup> but some of which may be mentioned here by way of illustration. Thus, it has been held, that no recovery could be had for injuries suffered by one who, without looking carefully along the track of a railroad, walked across or along it, and was run over by a train,<sup>2</sup> or who in like manner drove across the track, and was injured in his person or team,<sup>3</sup> nor for injuries to cattle which were negligently allowed by their owner to stray upon the track, where they were run over by a train,<sup>4</sup> nor for injuries suffered by a passenger on a railroad through his own contributing negligence,<sup>5</sup> nor where the injured party, being a passenger on a sleigh, stood in an exposed position,<sup>6</sup> nor where the plaintiff, being in a wrong part of the road, where he could not be seen, was run over by the defendant's team,<sup>7</sup> nor where, in case of collision, the injured vehicle was on the wrong side of the road, without

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damages to the owner (*Nodine v. Doherty*, 46 Barb. 59). In New Hampshire, the Massachusetts doctrine has been overruled (*Dutton v. Ware*, 17 N. H. 34).

<sup>1</sup> See *post*, §§ 199, 281-285, 302, 314, 335, 412-418, 443, 471, 487-493, 598.

<sup>2</sup> *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; *Button v. Hudson River R. Co.*, 18 Id. 248; *Brooks v. Buffalo &c. R. Co.* [Ct. of Appeals], 27 Barb. 532; affirming *S. C.* 25 Id. 600; *Mangam v. Brooklyn R. Co.*, 36 Barb. 230; *Bieseigel v. N. Y. Central R. Co.*, 33 Id. 429; *Brand v. Schenectady &c. R. Co.*, 8 Id. 368.

<sup>3</sup> *Wilds v. Hudson River R. Co.*, 24 N. Y. 430; 23 How. Pr. 492; *Steves v. Oswego &c. R. Co.*, 18 N. Y. 422; *Dascomb v. Buffalo &c. R. Co.*, 27 Barb. 221; *Mackey v. N. Y. Central R. Co.*, Id. 528; *Sheffield v. Rochester &c. R. Co.*, 21 Barb. 339; *Haring v. N. Y. & Erie R. Co.*, 13 Barb. 9; *Spencer v. Utica &c. R. Co.*, 5 Barb. 337.

<sup>4</sup> *Hance v. Cayuga &c. R. Co.*, 26 N. Y. 428; *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; *Bowman v. Troy & Boston R. Co.*, 37 Barb. 516; *Terry v. N. Y. Central R. Co.*, 22 Barb. 574; *Marsh v. N. Y. & Erie R. Co.*, 14 Barb. 364; *Talmadge v. Rensselaer &c. R. Co.*, 13 Barb. 493; *Clark v. Syracuse &c. R. Co.*, 11 Barb. 112; *Vandegrift v. Rediker*, 2 Zab. 185.

<sup>5</sup> *Todd v. Old Colony R. Co.*, 7 Allen, 207; *Willetts v. Buffalo &c. R. Co.*, 14 Barb. 585; *Clark v. Eighth Av. R. Co.*, 32 Id. 657; *Willis v. Long Island R. Co.*, Id. 398.

<sup>6</sup> *Spooner v. Brooklyn R. Co.*, 31 Barb. 419. Compare, however, *Spofford v. Harlow*, 3 Allen, 176.

<sup>7</sup> *Hartfield v. Roper*, 21 Wend. 615.

excuse,<sup>1</sup> nor, in case of vessels, where the injured boat was on the wrong side of the stream,<sup>2</sup> nor where a person injured by defects in a highway was needlessly walking at the time upon a part obviously dangerous,<sup>3</sup> nor for injuries to a horse by such defects, over which he was negligently driven,<sup>4</sup> and in other cases of a miscellaneous character.<sup>5</sup>

§ 41. It is important to determine whether the fault of the plaintiff, while acting in a representative capacity, can be relied upon as a defense to his action for damages suffered by him in his own right. Thus, if A., while acting purely as an agent, executor, receiver, or public officer, does something which contributes to an injury which he personally suffers from the negligence of B., is A. without remedy? We cannot find a satisfactory answer to this question in the decisions; but in our judgment the plaintiff must be held responsible to this extent for his fault in any capacity. Of course, he must be *in fault*, in a legal sense. If his error is one for which he is not legally answerable to any one, the fact that it contributed to his injury will not avail to relieve the defendant; but if it is of a kind for which he may be held to account by any one, it is a legal fault, which must be charged against him in

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<sup>1</sup> *Burdick v. Worrall*, 4 Barb. 596; *Morris v. Phelps*, 2 Hilt. 38. See *Hegan v. Eighth Av. R. Co.*, 15 N. Y. 380.

<sup>2</sup> *Rathbun v. Payne*, 19 Wend. 399.

<sup>3</sup> *Carolus v. Mayor &c. of N. Y.*, 6 Bosw. 15.

<sup>4</sup> *Cox v. Westchester Turnpike Co.*, 33 Barb. 414; *Harlow v. Humiston*, 6 Cow. 189.

<sup>5</sup> Such as where an injury was received in lifting stones (*Brown v. Maxwell*, 6 Hill, 592); where goods were damaged by water from a faucet left running (*Moore v. Goedel*, 7 Bosw. 591). A passenger by steamboat went upon a lighter lying alongside, for his own amusement merely, and while there was wounded by the negligent discharge of a gun by the defendant's servant. Although it did not appear that the steamboat was more safe than the lighter, it was held that the passenger was guilty of such contributory negligence as to deprive him of remedy (*McClenaghan v. Brock*, 5 Rich. Law, 17). This, however, is absurd; and, as the cause was really decided upon another issue, the opinion upon this point should not be followed anywhere.

his action upon the negligence of another. Under this theory, a public officer deciding in favor of a particular plan for a public work, in a quasi-judicial capacity, could not be charged with contributory negligence in his action for damages sustained by him through the defects of that very work, since he could not be, in a legal sense, *in fault* in his decision ;<sup>1</sup> but if an executive officer—*e. g.*, a street commissioner—should be careless in performing the work, and should afterward suffer an injury in part from the defects occasioned by his own negligence, he would be affected in his right to recover, precisely as if his default had been in his private capacity.<sup>2</sup>

§ 42. The rule which denies relief to a plaintiff guilty of contributory negligence, is based less upon considerations of what is just to the defendant, than upon grounds of public policy, which require, in the interests of the whole community, that every one should take such care of himself as can reasonably be expected of him.<sup>3</sup> It is a part of the same policy which regards suicide as a crime, which punishes vagrancy and idleness, and which has led some states to deal with confirmed spendthrifts as a species of lunatics. Waste or recklessness, even in respect to one's own property, is an injury to the state, and, indeed, to the whole world. And, though political economy has demonstrated the uselessness of attempting, by means of

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<sup>1</sup> The plaintiff, while a member of a city council, concurred with it in adopting a plan for a bridge. The bridge was built, and the abutments placed so that they obstructed the flow of the water more than was necessary, in consequence of which the plaintiff's mill was stopped. Held, that the plaintiff could recover (*Perry v. City of Worcester*, 6 Gray, 544). The *dicta* of this case go beyond the text, but cannot, as we think, be sustained.

<sup>2</sup> *Wood v. Waterville*, 4 Mass. 422 ; 5 Id. 294.

<sup>3</sup> See *Brendell v. Buffalo &c. R. Co.*, 27 Barb. 534, note ; *Dascomb v. Buffalo &c. R. Co.*, 27 Barb. 221, 227. The correctness of this theory has been questioned ; and it has been said that the true theory is, that the defendant is not the cause of the injury, if the plaintiff contributes to it. But if by this is meant that he is not the *sole* cause, it is begging the question ; and if it is meant that the defendant is liable in every case where he is the sole cause of the injury, it is not true (see § 34).

direct penal legislation, to reform such evils, it does not condemn those rules of law which, by making carelessness the means of its own punishment, teach caution, without attempting an impracticable severity. It is certainly open to grave doubt whether the admiralty rule, which divides the loss between the parties in fault, is not a better rule than that of the common law; but a jury cannot be trusted to apportion damages on that principle, which is unquestionably the chief reason why it has not been adopted in all the courts.

§ 43. The question as to the burden of proof in respect to the plaintiff's freedom from negligence, is one which has been made difficult by conflicting and evasive decisions. In Maine, Massachusetts, Connecticut, Maryland, and Illinois, it is held that the burden of such proof is upon the plaintiff, and that he must affirmatively establish that he was free from culpable negligence contributing to the injury.<sup>1</sup> Such, also, seems to be the law in Indiana;<sup>2</sup> and it has been so held in Wisconsin,<sup>3</sup> but later cases have thrown doubt upon the question there.<sup>4</sup> The same rule has been asserted, in general terms, in some cases in New York;<sup>5</sup> but it is settled in that state that there is no such invariable rule, and that the jury are at liberty to infer that

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<sup>1</sup> *Merrill v. Hampden*, 26 Maine, 234; *Dickey v. Maine Telegraph Co.*, 43 Id. 492; *Park v. O'Brien*, 23 Conn. 339; *Lane v. Crombie*, 12 Pick. 177; *Adams v. Carlisle*, 21 Pick. 146; *Carsley v. White*, Id. 254; *Parker v. Adams*, 12 Metc. 415; *Lucas v. Taunton, &c. R. Co.*, 6 Gray, 64; *Wilson v. Charlestown*, 8 Allen, 138; *Dyer v. Talcott*, 16 Ill. 300; *Galena &c. R. Co. v. Fay*, Id. 558; *Owings v. Jones*, 9 Md. 108. See *post*, § 412. But the practical construction of this rule is bringing it into reasonable limits (see *Cook v. Metropolitan R. Co.*, 98 Mass. 361).

<sup>2</sup> *Evansville &c. R. Co. v. Hiatt*, 17 Ind. 102. It was held in that case that the complaint must aver the plaintiff's freedom from negligence, which it certainly need not do if the burden of proof is not upon him.

<sup>3</sup> *Dressler v. Davis*, 7 Wisc. 527; *Chamberlain v. Milwaukee &c. R. Co.*, Id. 425.

<sup>4</sup> See *Milwaukee &c. R. Co. v. Hunter*, 11 Wisc. 160.

<sup>5</sup> *Spencer v. Utica &c. R. Co.*, 5 Barb. 337; per *Strong, J.*, *Button v. Hudson River R. Co.*, 18 N. Y. 248. In *Benedetti v. Mauchin* (1 Hilton, 213), it was held that the burden lay upon the defendant to prove negligence on the part of the plaintiff.



the plaintiff was sufficiently careful, from the absence of any contrary indications.<sup>1</sup> The Court of Appeals in New York has, however, scarcely yet been able to agree upon a definite rule, though it seemed, in its latest decisions, to in-

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<sup>1</sup> Johnson v. Hudson River R. Co., 20 N. Y. 64; affirming S. C., 6 Duer, 633; Ernst v. Hudson River R. Co., 35 N. Y. 9; Button v. Hudson River R. Co., 18 N. Y. 248; Ernest v. Hudson River R. Co., 24 How. Pr. 27; Wilds v. Hudson River R. Co., 24 N. Y. 430. In the case first cited, Denio, J., said: "I am of opinion that it is not a rule of law, of universal application, that the plaintiff must prove affirmatively that his own conduct on the occasion of the injury was cautious and prudent. The *onus probandi* in this, as in most other cases, depends upon the position of the affair, as it stands upon the undisputed facts. Thus, if a carriage be driven furiously upon a crowded thoroughfare, and a person is run over, he would not be obliged to prove that he was cautious and attentive, and he might recover, though there were no witnesses of his actual conduct. The natural instinct of self-preservation would stand in the place of positive evidence, and the dangerous tendency of the defendant's conduct would create so strong a probability that the injury happened through his fault, that no other evidence would be required. But if one make an excavation or lay an obstruction in the highway, which may or may not be the occasion of an accident to a traveler, it would be reasonable to require a party seeking damages for an injury to give general evidence that he was traveling with ordinary moderation and care. The obligation to give such evidence would be greater or less, according as the impediment was more or less dangerous. \* \* \* The culpability of the defendant must be affirmatively proved before the case can go to the jury, but the absence of any fault on the part of the plaintiff may be inferred from circumstances; and the disposition of men to take care of themselves and keep out of difficulty may properly be taken into consideration. Nor is it correct to say, as a general rule, that the defendant must himself prove, in order to establish his defense, that the plaintiff was guilty of negligence. That, as well as the absence of fault, may be inferred from the circumstances, and the negligent act of the defendant may be of such a mitigated character, that a party complaining of an injury from it ought to show that it occurred without fault on his own part. This seems to me entirely consistent with the principle that the jury must, in order to find a verdict for the plaintiff, be able to say that the injury happened from the negligence of the defendant, to which the plaintiff did not by any act of his contribute. \* \* \* The true rule, in my opinion, is this: The jury must eventually be satisfied that the plaintiff did not, by any negligence of his own, contribute to the injury. The evidence to establish this may consist in that offered to show the nature or cause of the accident, or in any other competent proof. To carry a case to the jury, the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned solely by the negligence of the defendant. It is not absolutely essential that the plaintiff should give any affirmative proof touching his own conduct on the occasion of the accident. The character of the defendant's delinquency may be such as to prove, *prima facie*, the whole issue; or, the case may be such as to make it necessary for the plaintiff to show, by independent evidence, that he did not bring the misfortune upon himself. No more certain rule can be laid down." It was further said, in that case, that the absence of any fault on the part of the plaintiff might be inferred from the circumstances, in connection with the ordinary habits, conduct, and motives of men.

cline to the opinion that the burden of proof is upon the plaintiff, so far, at least, as to make it the duty of the jury to give a verdict against him, if his freedom from contributory fault remains in doubt.<sup>1</sup> In other states, it is the rule that the plaintiff's negligence is matter of defense, the burden of pleading and proving which rests upon the defendant.<sup>2</sup> In any case, the question must be left to the jury, unless the proof, one way or the other, is entirely clear and free from conflict.<sup>3</sup>

§ 44. Our own view of the question agrees almost entirely with that expressed by Duer, J., in the New York Superior Court.<sup>4</sup> That able judge held negligence on the part of the plaintiff to be a mere matter of defense, to be

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<sup>1</sup> Accordingly, in *Welling v. Judge* (40 Barb. 193), a new trial was granted on account of the refusal of the judge at circuit to charge the jury that the burden of proof in this respect was upon the plaintiff. In Texas, it is held that if it remains uncertain whether the plaintiff used ordinary care or not, he cannot recover (*Walter v. Herron*, 22 Texas, 55).

<sup>2</sup> See *Durant v. Palmer*, 5 Dutch, 544; *Beatty v. Gilmore*, 16 Penn. St. 463. The defendant asked the court to instruct the jury that "it lay upon the plaintiff to show that he had used that degree of care and prudence which was necessary to have prevented a collision with defendants' cars, and that he must show this affirmatively;" and also, that "in a public street, and not dangerous, *per se*, if a person comes against an obstruction in the day time, and receives injury, he cannot recover against a wrongdoer without showing affirmatively that he had used that amount of care which was required, under the peculiar circumstances of the case, to pass by it, and having used the same, is nevertheless damaged." Held, that both requests were properly refused (*Pennsylvania R. Co. v. McTighe*, 46 Penn. St. 316). But it has since been very properly adjudged in Pennsylvania, that if the plaintiff's own evidence shows contributory negligence on his part, the defendant cannot be required to produce any testimony on that point, and the plaintiff must fail (*Waters v. Wing*, 59 Penn. St. 211). And, with some limitations, the same rule has been applied in Vermont (*Hill v. New Haven*, 37 Verm. 501; *Lester v. Pittsford*, 7 Id. 158; but see *contra*, *Hyde v. Jamaica*, 27 Id. 443).

<sup>3</sup> *Creed v. Hartmann*, 29 N. Y. 591; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9; *S. C.* again, 6 Trans. App. 35; *Munroe v. Leach*, 7 Metc. 274; and other cases cited on page 10. "The question of negligence depends, ordinarily, upon so many minute circumstances, and is governed so much by the facts of each particular case, that it is very difficult to lay down any safe or practical general rule on the question what constitutes it, and it is well said, that the evidence of it should be clear and decisive to impute legal error in a judge who submits it under conflicting facts to the determination of a jury" (*Dickens v. N. Y. Central R. Co.*, 38 N. Y. 21, per Hogeboom, J.)

<sup>4</sup> *Johnson v. Hudson River R. Co.*, 5 Duer, 21.

proved affirmatively by the defendant, though it might, of course, be inferred from the circumstances proved by the plaintiff. He pointed out that parties were never required to prove negative matters of this kind, and also that it had never been held necessary, in a complaint upon negligence, to aver that the plaintiff had taken due care.<sup>1</sup> It is true, as is said in one place, by way of argument in support of the rule throwing the burden of proof upon the plaintiff, that he cannot recover unless two things concur,—negligence on the part of the defendant, and freedom from contributory fault on his own part;<sup>2</sup> but if, as is argued by the judges maintaining the Massachusetts doctrine, this proves that the plaintiff is bound to prove both propositions, why should he not also be bound to prove every other fact which must concur to enable him to support his action? And if this broad rule is adopted, even if we distinguish such defenses as payment, release, satisfaction, &c., as relating to facts subsequent to the act complained of, we cannot see upon what ground the plaintiff is to be excused from proving that he is not an alien enemy, if war exists, or that he is not in a state prison, or that the defendant is not acting under the authority of any statute in what he did, or, in cases where the defendant would not be responsible if he was a mere agent,

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<sup>1</sup> Citing *Gough v. Bryan* (2 Mees. & W. 770); *Bridge v. Grand Junc. R. Co.* (3 Mees. & W. 244). These were actions upon negligence, in each of which the plaintiff demurred to the plea. In neither case did the declaration aver any care on the part of the plaintiff; and no objection was made upon that ground, although, if such an allegation had been deemed necessary, its omission would have been available to the defendant on the demurrer to his plea. In the latter case, the defendant attempted to plead the negligence of the plaintiff as a defense, and his plea, not making out such negligence as would prevent the plaintiff from recovering, was held bad in substance. The point has been since expressly adjudged in an action against a common carrier (*Richards v. Westcott*, 2 Bosw. 589). But the contrary has been held in Indiana (*Evansville &c. R. Co. v. Hiatt*, 17 Ind. 102; *Evansville &c. R. Co. v. Dexter*, 24 Ind. 411; *Indianapolis &c. R. Co. v. Keeley*, 23 Ind. 133; compare *Toledo &c. R. Co. v. Bevin*, 26 Ind. 443).

<sup>2</sup> Per Strong, J., *Button v. Hudson River R. Co.*, 18 N. Y. 248.

that he was not acting as an agent.<sup>1</sup> And at any rate, what possible ground of distinction can there be between the rule forbidding a plaintiff to recover when his negligence has contributed to the injury, and that which prevents a recovery for a fraud or trespass when the parties are *in pari delicto*? Yet we are not aware of any case in which it has been held that the plaintiff in such actions must assume the burden of showing himself free from fault. The reason why the plaintiff is not required to prove these negative circumstances is that they are presumed, as in accordance with the natural order and general state of things; and we think there is just as well established a presumption that every person uses ordinary care. Certainly that presumption has been always held to exist in favor of a defendant,<sup>2</sup> and there can be no good reason for making a distinction unfavorable to plaintiffs. Such a presumption seems indeed almost necessary, since presumptions are founded upon the occurrence of the facts presumed in the majority of cases, and it would be a contradiction in terms to say that the majority of men in a civilized community do not take ordinary care of themselves.

§ 45. Slight circumstances may overbalance the presumption of freedom from negligence which we suppose to exist in favor of a plaintiff. Thus his being found in a position of danger, unexplained,<sup>3</sup> or his free use of intoxicating liquor, even though much short of positive drunkenness,<sup>4</sup> or any evidence tending to show careless habits, should suffice to turn the scale. And if it appears that any defects in the things or faults in the persons employed

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<sup>1</sup> For illustrations of such cases, see the chapters on MASTER AND SERVANT.

<sup>2</sup> *Holbrook v. Utica &c. R. Co.*, 12 N. Y. 236; *Terry v. Central R. Co.*, 22 Barb. 574.

<sup>3</sup> See *Button v. Hudson River R. Co.*, 18 N. Y. 248. There the injured person was seen lying upon the track before the train came along.

<sup>4</sup> In *Button v. Hudson River R. Co.* (18 N. Y. 248), weight was justly attached to this circumstance.

by the plaintiff contributed to his injury, the burden is clearly upon him to show not only that he did not know or suppose that such defects or faults existed, but also that he was in no fault for not knowing of their existence.<sup>1</sup>

§ 46. Where the negligence of any other person is imputed to the plaintiff, it must appear that such person was the plaintiff's agent in the transaction, and either that he was under the plaintiff's control, or that he controlled the plaintiff's personal conduct.<sup>2</sup> The fact that the injury was caused by the joint negligence of the defendant and a stranger is of course no defense;<sup>3</sup> and unless the person whose fault is relied upon by the defendant as an excuse was subject to the direction of the plaintiff, his fault cannot properly be charged upon the latter. Therefore a passenger in a public conveyance,<sup>4</sup>

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<sup>1</sup> *Winship v. Enfield*, 42 N. H. 197. See the chapter on HIGHWAYS.

<sup>2</sup> *Eaton v. Boston & Lowell R. Co.*, 11 Allen, 500.

<sup>3</sup> *Ante*, § 27, and cases there cited. In *Smith v. Dobson* (3 Man. & Gr. 59), it appeared that the plaintiff's barge was sunk by a swell in the river, caused by two steamers owned by different persons. The jury gave a verdict against the defendant for £20 on the ground that, the total damage being £80, this was a fair proportion for the defendant's share in the transaction, and the court refused to interfere with the verdict. A company undertaking for its own profit to maintain a channel for carrying off water, and neglecting to do so effectually, is responsible for damage done to the adjoining land by reason of the banks giving way after an unusual rainfall, although other persons who were bound to keep the outlet of the channel of certain dimensions had failed to perform that duty, and had thereby occasioned an increase of water in the channel, without which its banks would not have given way (*Harrison v. Great Northern R. Co.*, 3 Hurlst. & C. 231). Nevertheless, it has been held in Maine and Massachusetts that a town is not liable for injuries caused by defects in the highways, arising partly from the negligence of the town and partly from that of a private person, even though the plaintiff is wholly free from fault (*Richards v. Enfield*, 13 Gray, 344; *Rowell v. Lowell*, 7 Id. 100; *Alger v. Lowell*, 3 Allen, 402; *Shepherd v. Chelsea*, 4 Allen, 113; *Moulton v. Sanford*, 51 Maine, 127). But this is on the special ground that municipal corporations are liable in such cases only by force of the statute, and that the statute does not cover cases of such joint negligence. We presume that the third party in fault would be held liable for the entire damage (see *Smith v. Smith*, 2 Pick. 621; *McCahill v. Kipp*, 2 E. D. Smith, 413; *Powell v. Deveney*, 3 Cush. 300; *Mott v. Hudson River R. Co.*, 8 Bosw. 345).

<sup>4</sup> This is the settled law in New York (*Webster v. Hudson River R. Co.*, 38 N. Y. 260; *Chapman v. New Haven R. Co.*, 19 N. Y. 341; *Colegrove v. New Haven R. Co.*,

such as a railroad car, a ship, or a stage, is not precluded, by the mere fact that the injury was in part caused by the negligence of the person in charge of the vehicle in which he was traveling at the time, from recovering against one whose negligence injures him. The principle governing such cases is the same which determines the responsibility of a defendant for the negligence of a third person: a sub-

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6 Duer, 382; affirmed, 20 N. Y. 492). In the second case, the court said, "It is entirely plain that the plaintiff had no control, no management, even no advisory power over the train on which he was riding. Even as to selection, he had only the choice of going by that railroad or by none. To attribute to him therefore the negligence of the agents of the company, and thus bar him of a right of recovery, is not applying any existing exception to the general rule of law, but is framing a new exception which does not in fact rest upon the reason of the original exception, and is based on fiction, and inconsistent with justice." And though a contrary decision has been made in respect to stage-coaches (*Brown v. N. Y. Central R. Co.*, 31 Barb. 385; affirmed on other grounds, 32 N. Y. 597), and followed by the Superior Court of New York city in respect to street railroads (*Mooney v. Hudson River R. Co.*, 5 Robertson, 548), that decision was based upon an English case (*Thorogood v. Bryan*, 8 C. B. 115), in which a similar ruling was made, but which has been strongly disapproved of in England (see *Tuff v. Warman*, 2 C. B. [N. S.] 740, 750, per Williams, J., citing 1 Smith L. C. 4th ed. 220), and substantially overruled by the court of last resort in New York: indeed, in *Brown v. N. Y. Central R. Co.* (*supra*), the court had no right to consider this question on the appeal, since the judge at the trial had charged in accordance with this view, and the appeal was brought by the defendant, at whose request such a charge was made. The court was bound to assume that the charge was correct, so far as it was favorable to the plaintiff (see *Stanton v. Wetherwax*, 16 Barb. 259); and the remarks on appeal were therefore entirely *obiter*. This has been since pointed out, and these remarks overruled, in *Webster v. Hudson River R. Co.* (38 N. Y. 260). The doctrine of *Thorogood v. Bryan* has been followed, however, in Massachusetts (*Smith v. Smith*, 2 Pick. 621), and in Ohio (*Cleveland, Col. & C. R. Co. v. Terry*, 8 Ohio St. 570; *Puterbaugh v. Reasor*, 9 Id. 484). In Pennsylvania, the question has recently undergone discussion, and the result is in conformity with the language of the text (*Lockhart v. Lichtenthaler*, 46 Penn. St. 151). In *Rigby v. Hewitt* (5 Exch. 240), Rolfe, B., charged the jury that the plaintiff, who was riding in an omnibus, was not disentitled to recover merely because the omnibus was driven at a furious rate, and this was held to be a correct instruction (see also *Danville & C. Turnpike Co. v. Stewart*, 2 Metc. [Ky.] 119; *Bridge v. Grand Junction R. Co.* 3 Mees. & W. 244). In *Greenland v. Chaplin* (5 Exch. 243), where the plaintiff, a passenger on board a steamer, had been injured by the falling of its anchor, in consequence of a collision with defendant's steamer, it was held a misdirection to charge the jury that plaintiff was not entitled to recover if there was negligence in the stowage of the anchor, although the collision occurred through the negligence of the defendant. In *Brown v. McGregor* (F. C. 1813; Hay, 10), where a passenger was killed by the overturning of a coach, in consequence of a collision with a postchaise, while both were driving at an unusual speed, it was held, that the proprietors of the

ject which is fully discussed in the chapter on the liability of a master for the acts of his servant. Where a wife suffers an injury while under the immediate care of her husband, it has been held that his negligence will bar her recovery to the same extent as if it were her own.<sup>1</sup>

§ 47. The knowledge, by a principal, of the existence of a danger—*e. g.*, an obstacle in the road—does not necessarily prevent him from recovering damages for an injury to his property occasioned by such danger while the property was in charge of an agent who was not aware of the existence of the danger.<sup>2</sup> Such knowledge will not prejudice the right of action, unless it appears that the principal could, by the use of ordinary care and diligence, have communicated it to his agent in time to avoid the injury.

§ 48. The application of these rules to cases of injuries suffered by small children, has been found a matter of some difficulty. It is held in New York, Massachusetts, Indiana, and perhaps Illinois, that an infant is personally chargeable with any negligence or other fault of his guardian, whereby he is exposed to an injury.<sup>3</sup> The true rule, as

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coach and chaise were jointly and severally liable in damages, and that the loss of a husband or father was not to be estimated merely by the pecuniary advantages which his family derived from his exertions, but that if his life be improperly taken away, the court must give damages *in solatium* of the wounded feelings and affections of his relatives. In *Knapp v. Dagg* (Circuit, 18 How. Pr. 186), it appeared that the plaintiff was riding in her brother's wagon, when injured by the co-operating negligence of the defendant and of her own driver. *Balcom, J.*, charged the jury that these facts did not bar the plaintiff's recovery, and she had a verdict.

<sup>1</sup> *Carlisle v. Sheldon*, 38 Verm. 440.

<sup>2</sup> *Garmon v. Bangor*, 38 Maine, 443.

<sup>3</sup> *Hartfield v. Roper*, 21 Wend. 615; *Mangam v. Brooklyn R. Co.*, 36 Barb. 230; 38 N. Y. 455; *Lehman v. Brooklyn*, 29 Barb. 234; *Kreig v. Wells*, 1 E. D. Smith, 74; *Holly v. Boston Gas Co.*, 8 Gray, 123; *Callahan v. Bean*, 9 Allen, 401; *Wright v. Malden &c. R. Co.*, 4 Allen, 283; *Pittsburgh, Fort Wayne &c. R. Co. v. Vining*, 27 Ind. 513; *Lafayette &c. R. Co. v. Huffmann*, 28 Id. 287; see *Chicago v. Starr*, 42 Ill. 174; *Waite v. Northeastern R. Co.*, El. B. & E. 719.

we think (if any rule of this kind is to be maintained), is, that an infant is chargeable with any negligence of his guardian in putting or keeping the infant in a position of danger, or permitting him to be in such a position, but not for any negligence of his guardian in an individual capacity. Under this rule, a child who has been exposed by the carelessness of his parents or guardians, in their capacity as such, to the risk of injury, is debarred from recovering damages in the same cases in which he would be precluded from recovering, if he were of full age, and had been himself guilty of such negligence. Thus, if a child is permitted to go alone into a highway, when of an age at which it is unable to comprehend and avoid the dangers to which the road is naturally liable,<sup>1</sup> it cannot recover compensation for an injury inflicted by mere negligence, while

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<sup>1</sup> It has been held not negligence, as *matter of law*, for the parents of a child six or seven years old, to allow him to go into the streets unattended. The question of negligence in such case must be left to the jury (*Oldfield v. Harlem R. Co.*, 14 N. Y. 310; affirming *S. C.*, 3 E. D. Smith, 103; compare *Honegsberger v. Second Ave. R. Co.*, 1 Daly, 89; reversed, 2 Keyes, 570). The same ruling was made in the case of a child eight years old (*Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49); and nine (*Sheridan v. Brooklyn &c. R. Co.*, 36 N. Y. 39). Nor in the case of a child eleven years old, is it necessarily negligent to allow him to go out alone, even after dark (*Lozett v. Salem &c. R. Co.*, 9 Allen, 557). But it has been held negligence, as *matter of law*, to allow a child of about two years (*Hartfield v. Roper*, 21 Wend. 615), two years and four months (*Callahan v. Bean*, 9 Allen, 401), seventeen months (*Kreig v. Wells*, 1 E. D. Smith, 74), three years (*Mangam v. Brooklyn R. Co.*, 36 Barb. 230), four years (*Glassey v. Hestonville &c. R. Co.*, 57 Penn. St. 172; see *Lehman v. Brooklyn*, 29 Barb. 234), or even six years of age (*Chicago v. Starr*, 42 Ill. 174), to go thus unattended, in the absence of some explanation. See, however, to the contrary, as to a child about two years old (*Boland v. Missouri R. Co.*, 36 Mo. 484), as to one less than four years old (*Robinson v. Cone*, 22 Verm. 213), and as to a child of four (*Chicago v. Major*, 18 Ill. 349). "The fact, that a young child, who has parents or other guardians and protectors, is found alone and unwatched in the street, is presumptive evidence that he was so exposed voluntarily or negligently by his protectors, and that their negligence thus contributed to his injury. But the fact that the child is in the street alone, or in the way of a vehicle alone, is not conclusive that he is there by the negligence of those for whose care the law holds him responsible. It is a fact which admits of explanation, and, notwithstanding which, the question of negligence is open to inquiry" (per Emott, J., *Mangam v. Brooklyn City R. Co.*, 36 Barb. 230). In a Scotch case, the defendants were the owners of the land along the banks of an unfenced water-course, into which the plaintiff's child fell, and was drowned. Held, that the fault lay with the plaintiff for allowing a child to



it is acting in a manner which, in a person of mature years, would be deemed so negligent as to deprive *him* of the right to sue.<sup>1</sup> So, if the parent or guardian of a child keeps it in a position known to such guardian to be dangerous, the child is chargeable with the like knowledge. But if the guardian, acting as an individual only, does any thing tending to injure the child, the latter is not chargeable with the act, even though it also tends to expose him to injury from other persons. For example, the negligence of a parent, in permitting the gas pipes of his house to leak, is not chargeable to his child, so as to bar an action by the latter for an injury caused by an explosion of gas through the defendant's negligence;<sup>2</sup> but if the

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go out unattended (*Davidson v. Monkland R. Co.*, 27 Jur. 541; 17 Dunlop, 1088 Hay, 217). In another case, the son of the plaintiff came to the pit where his father was working. Some one asked him to get some water, and, while getting it, he took hold of the winding chain of an engine, and was drawn up by it and crushed to death. Held, that the defendants were not liable, the fault being with the plaintiff in allowing a very young boy to be around the pit (*Lumsden v. Russel*, 28 Jur. 181; 18 Dunlop, 468; Hay, 238). And in another case, the defendants were timber merchants, occupying premises bounded by a canal, along the banks of which they were allowed to lay down wood. The public had no right to frequent the banks, but were not hindered, and, in point of fact, people went there, and particularly children. A son of the plaintiff, while playing among the timber, was killed by the falling of a heap of timber on him. Held, that no liability attached to the defendants for the accident (*Balfour v. Baird*, 30 Jur. 124; 20 Dunlop, 328; Hay, 289). In an English case, P., having charge of a child too young to take care of itself, took two tickets at a railway station, for the purpose of the two being conveyed on the railway. While P. and the child were on the railway, after P. had taken the tickets, the child was injured by an accident which was caused by the joint negligence of P. and the company's servants. Held, that the child could not maintain an action against the company (*Waite v. Northeastern R. Co.*, El. Bl. & E. 719).

<sup>1</sup> This limitation is not expressly sanctioned by the decisions, but is so obviously consistent with good sense, and with the facts upon which the decisions were based, that its propriety cannot be doubted. Thus, it would be impossible to say that a child, even though barely able to walk, may be run over with impunity, while on the sidewalk, conducting itself in the same manner as grown persons.

<sup>2</sup> *Lannen v. Albany Gas Light Co.*, 46 Barb. 264. This was an action against the defendants, a gas company, for the negligence of its servants in igniting a match near a leak in the gas pipes of a dwelling, causing an explosion, whereby the plaintiff, who was an infant and an inmate of the house (her father's), was injured. Proof was adduced that the defective pipe had been put in by the plaintiff's father, though put in with care, and subsequently inspected and approved by the defendant, and

circumstances of the case made it the duty of the parent, as a parent, to remove the child from the house, his failure to do so would be chargeable to the child, precisely as if he had been of full age, and had negligently remained in the house of his own accord.<sup>1</sup> If, however, the guardian of a child has taken reasonable care of him, and, notwithstanding the use of such care, the child escapes into a dangerous place, there is no negligence on the part of the guardian to be imputed to the child,<sup>2</sup> and it must be judged according to its natural ability.

§ 48 *a.* In Vermont, Connecticut, Pennsylvania, and Ohio, the whole doctrine that the negligence of a parent or guardian is to be imputed to a child is distinctly repudiated, and it is held that such negligence is not to be considered in an action brought by the child.<sup>3</sup> When a

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there was no decisive evidence to show how the fracture in the pipe was produced. In answer to the argument that the negligence of the father (if any) should be imputed to the infant plaintiff, Hogeboom, J., said: "I know of no just or legal principle which, when the infant himself is free from negligence, imputes to him the negligence of the parent, when, if he were an adult, he would escape it. This would be visiting 'the sins of the fathers upon the children' to an extent not contemplated in the decalogue or in the more imperfect digests of human law."

<sup>1</sup> *Holly v. Boston Gas Light Co.*, 8 Gray, 132. The particular application of the principle made in this case seems to us very questionable, inasmuch as the facts did not make it clearly necessary or wise for the plaintiff to leave the house. Indeed, it might have been out of his power to do so. But the principle itself seems right. In that case, Merrick, J., said: "Nor does it make any difference that the plaintiff is a minor. She was under the care of her father, who had the custody of her person and was responsible for her safety. \* \* \* She was entitled to the benefit of his superintendence and protection, and was consequently subject to any disadvantages resulting from the exercise of that parental authority which it was both his right and his duty to exert. Any want of ordinary care, therefore, on his part, is attributable to her in the same degree as if she were wholly acting for herself."

<sup>2</sup> *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455; affirming S. C., 36 Barb. 230. In that case, a child less than four years old was left in a room alone for a very few minutes, the front door being locked, and escaped through the window into the street, where he was almost immediately run over by a railroad car, negligently driven. Held, that he could recover against the railroad company, if the jury should deem that sufficient care had been taken of him; and a nonsuit was set aside.

<sup>3</sup> *Robinson v. Cone*, 22 Verm. 213; *Daley v. Norwich & W. R. Co.*, 26 Conn. 591; *North Penn. R. Co. v. Mahoney*, 57 Penn. St. 187; *Smith v. O'Connor*, 48 Id. 218; *Bellefontaine & C. R. Co. v. Snyder*, 18 Ohio St. 399.

parent or master sues for the loss of service caused to him by an injury to the child, the contributory negligence of the actual plaintiff, or of his agents, is, of course, a good defense.<sup>1</sup>

§ 49. The opinions of judges on the point have been conflicting, but, upon the whole, the weight of authority seems to be in favor of holding an infant, so far as he is *personally* concerned, only to such a degree of care as is usual among children of his age;<sup>2</sup> though if his own act

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<sup>1</sup> Glassey v. Hestonville &c. R. Co., 57 Penn. St. 172.

<sup>2</sup> Mangam v. Brooklyn R. Co., 38 N. Y. 455; O'Mara v. Hudson River R. Co., Id. 445; Rauch v. Lloyd, 31 Penn. St. 358; Pennsylvania R. Co. v. Kelly, Id. 372; North Penn. R. Co. v. Mahoney, 57 Penn. St. 187; Robinson v. Cone, 22 Verm. 213; Munn v. Reed, 4 Allen, 431; Birge v. Gardiner, 19 Conn. 507; Lynch v. Nurdin, 1 Q. B. 29; see Phil. & Reading R. Co. v. Spearen, 47 Penn. St. 300; Chicago, Burl. &c. R. Co. v. Dewey, 26 Ill. 255, per Walker, J. But, to the contrary, see Honegsberger v. Second Avenue R. Co., 1 Keyes, 570; 33 How. Pr. 193; reversing S. C., 1 Daly, 89; Burke v. Broadway R. Co., 49 Barb. 529; 34 How. Pr. 239; Hartfield v. Roper, 21 Wend. 615. In Pennsylvania, it has been held that the rule of law, as to mutual negligence between adult plaintiff and defendant, does not apply to the case of a child of tender years, who is to be held only to the exercise of that degree of care and discretion ordinarily to be expected from children of that age (Smith v. O'Connor, 48 Penn. St. 218; North Penn. R. Co. v. Mahoney, 57 Penn. St. 187; see Philadelphia &c. R. Co. v. Spearen, 47 Penn. St. 300). In an action, by a father, to recover for injuries received by his son, a boy of sixteen, owing to a defect in the street, while he was running to a fire with the engine, it was held that whether or not the plaintiff's son was guilty of negligence or misconduct, which contributed to the injury, was a question for the jury; and where they were instructed, in estimating the degree of care required, to consider the age, intelligence, and physical strength of the boy, and apply to his conduct the same standard that they would in judging of boys of like age, strength, and intelligence, and that, if it was common for such boys to run with fire-engines, as the plaintiff's son did at the time of the accident, the jury should take the fact into consideration, in determining whether his conduct was reasonably prudent when he was injured, the instruction was held not erroneous (Oakland R. Co. v. Fielding, 47 Penn. St. 320). In a case in Vermont, the plaintiff, who was about three and one-half years old, while returning from school (his parents permitting him to go and return alone), was sliding down hill upon a sled, when the defendant negligently ran over and injured him: the plaintiff, by the exercise of such care as would be reasonable to expect from an adult, could have avoided the accident. Held, that as the plaintiff was bound to exercise only such care as might reasonably be expected from a person in his situation, and the negligence of the parent would not preclude the plaintiff from redress, the defendant was liable (Robinson v. Cone, 22 Verm. 213). In an English case *at nisi prius*, it appeared that the plaintiff, an infant three and one-quarter years old, ran out into the road and was run over by the defendant. It was

directly brings the injury upon him, while the negligence of the defendant is only such as exposes the child to the possibility of injury, the latter cannot recover damages.<sup>1</sup> No injustice is done to the defendant by this qualification of the rule concerning contributory negligence; since, as we have already shown,<sup>2</sup> the rule itself is not established primarily for his benefit, and the policy of the law, upon which the rule is founded, does not aim at so impracticable an object as the enforcement of sound discretion in a mere child. Of course, no one is liable for an injury produced entirely by want of discretion on the part of the child who suffers from it, as, for example, where a child suddenly throws itself in the way of a horse, and is run over before the driver can prevent it.<sup>3</sup>

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held, that, even if the plaintiff was guilty of negligence, that would not preclude him from recovering (*Gardner v. Grace*, 1 Fost. & Finl. 359). Channell, B., said: "The doctrine of contributory negligence does not apply to an infant of tender age. To disentitle the plaintiff to recover, it must be shown that the injury was occasioned entirely by his own negligence."

<sup>1</sup> Thus, where the defendant left the cover of his cellar loose so that it could easily be pulled down, and a child five years old got upon it, and, in jumping down, dragged it upon himself and another child jointly acting with him, it was held, that neither child could recover for the injury (*Hughes v. Macfie*, 2 Hurlst. & Coltm. 744). So, where the defendant exposed a machine for sale, in a place where any one could put it in motion; and the plaintiff, a child of four years old, purposely put his fingers between the cogwheels while his brother (who was seven years old) was turning them, he was nonsuited (*Mangan v. Atterton*, Law Rep. 1 Exch. 239; 4 Hurlst. & Coltm. 388). The following case, however, is to the contrary: The defendant negligently hung a gate, and the plaintiff, who was six or seven years old, lawfully passing by, put his hands upon the gate, and shook it, in consequence of which it fell upon and injured him. The jury having found, in respect to the age, condition, and circumstances of the plaintiff, that he was guilty of no negligence, it was held that, even if the plaintiff was a trespasser, he could recover (*Birge v. Gardiner*, 19 Conn. 507).

<sup>2</sup> *Ante*, § 42.

<sup>3</sup> This was substantially the case in *Hartfield v. Roper* (21 Wend. 615), and the court, therefore, held the defendant free from negligence. The *dicta* of the court in that case, upon other points, have been strongly disapproved in Pennsylvania (*Rauch v. Lloyd*, 31 Penn. St. 358), and Vermont (*Robinson v. Cone*, 22 Verm. 213). In a late case in New York, where an infant, in reckless and childish haste, approached so near a railroad car as to bump his head against it, it was held no excuse that he did not see the car. "It appears to be negligence not to have done so. Ordinary prudence would have prevented. Nor is it any excuse that the lad had less discretion than a

§ 50. The rules which govern in the case of mere children, do not apply to minors who have attained to years of discretion. Such minors, though under guardianship, are responsible for their failure to use the ordinary degree of care, and are not prejudiced by the negligence of their guardians.<sup>1</sup>

§ 51. All that we have said in regard to children is equally applicable to lunatics of any kind,<sup>2</sup> with this difference as to the obligations of others toward them, that the sight of a child ought to be sufficient to induce every mature person to take greater care than he otherwise would,<sup>3</sup> whereas a lunatic does not necessarily manifest his infirmity by his appearance, and one who is not aware of that fact is not to blame for dealing with him as a person of ordinary intellect.<sup>4</sup>

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man. He is required to exercise the prudence of a person of ordinary intelligence, before an action for damages arises for an injury to his person resulting partly from the carelessness of others. The lad was required to take the same care of himself as any other person. All are held accountable for a reasonable degree of prudence as to their own safety. That reasonable care is the same, whether the rule be applied to a simpleton or a wise man. An injury received without reasonable prudence on the part of the person injured, gives no right to recover amends in pecuniary damages. The father can recover only under the same circumstances of prudence as would be required if the action were on behalf of the boy" (*Burke v. Broadway and Seventh Avenue R. Co.*, 49 Barb. 529).

<sup>1</sup> *McMahon v. Mayor &c. of New York*, 33 N. Y. 642. The defendant, in that case, was repairing an old well in front of the plaintiff's house, and, in consequence of negligence in covering it, the plaintiff's son, a boy of eleven years old, fell into it and was killed. In an action by plaintiff as administrator of his son, it was held that negligence of the parents of the child did not necessarily form a defense to the action, and Wright, J., remarked: "The deceased was not an infant, incapable of taking proper care of himself in the street. \* \* Had he survived the injury, and been without fault himself, he could have recovered, notwithstanding his father or mother were guilty of negligence; and so may his administrator, such injury causing his death" (see *Oakland R. Co. v. Fielding*, 48 Penn. St. 320).

<sup>2</sup> *Willets v. Buffalo &c. R. Co.*, 14 Barb. 585; see *Hartfield v. Roper*, 21 Wend. 615, 619.

<sup>3</sup> See this distinction commented upon by Redfield, J. (*Robinson v. Cone*, 22 Verm. 213, 225).

<sup>4</sup> A lunatic was traveling on a railroad, in charge of his father, and the father left him in one car and took a seat in another. The lunatic not paying his fare after repeated requests, the conductor, in ignorance of his condition, put him off the train;

§ 52. Although for convenience we have uniformly spoken of the person whose contributory fault might bar the action, as the "plaintiff," it is of course to be understood that, in an action for injuries causing death, the deceased person is the one referred to in this chapter under the name of the plaintiff; and his contributory fault will be a bar to the action, to precisely the same extent as if he were the actual plaintiff in the action;<sup>1</sup> while the contributing fault of the plaintiff of record would be no answer to the claim, unless he were the only person to be benefited by the recovery, which in general he is not. And where the action is brought by a parent or master for the loss of service caused by a negligent injury to a child or servant, the negligence of either the plaintiff of record or of the injured person, is to be deemed negligence of the "plaintiff," within the meaning of this chapter.<sup>2</sup>

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and he wandered about the track, and was run over by another train and killed. Held, that there was negligence on the part of the father, which was attributable in law to the lunatic, and none to the conductor; and the father, as administrator of the lunatic, could not recover against the company (*Willets v. Buffalo & C. R. Co.*, 14 Barb. 585). Where a deaf mute slave, who was walking on a railroad, with his back to an approaching train, was killed by the train, it not appearing that the engineer knew of the slave's infirmity, and it being shown that the usual warning was given by the steam whistle, it was held, that the railroad company was not liable for the loss (*Poole v. North Carolina R. Co.*, 8 Jones [N. C.] Law, 340).

<sup>1</sup> *Lofton v. Vogles*, 17 Ind. 105; *Rowland v. Cannon*, 35 Geo. 105; *Witherley v. Regent's Canal Co.*, 13 C. B. [N. S.] 2. In the last case it appeared that a swing bridge over a canal crossing a public highway, when turned back for the passage of a barge along the canal, left a gap on the side of the road without any fence toward the water. A., being upon the bridge whilst it was in this state, and the spot being dark, incautiously stepped back and fell into the water and was drowned. In an action under stat. 9 and 10 Vict. c. 93, the jury were told, that if they thought there had been negligence on the part of the company, and no want of proper care and caution on the part of the deceased, the plaintiff was entitled to a verdict; but that, if they thought that the deceased had by his own negligence contributed to the accident, they must find for the defendants. Held, a proper direction, and that, upon the facts, the jury were warranted in finding for the defendants, although they were of opinion that the bridge was not secured as it should have been. See other cases cited, *post*, § 302.

<sup>2</sup> *Gilligan v. N. Y. & Harlem R. Co.*, 1 E. D. Smith, 453.

## PART II.

### WHO MAY BE LIABLE FOR NEGLIGENCE, AND TO WHOM.

#### CHAPTER IV. PARTIES TO ACTIONS FOR NEGLIGENCE.

V. LIABILITY OF MASTERS FOR THE ACTS OF THEIR SERVANTS.

VI. LIABILITY OF MASTERS TO SERVANTS.

VII. LIABILITY OF SERVANTS TO THIRD PERSONS.

VIII. MUNICIPAL CORPORATIONS.

IX. PUBLIC OFFICERS.

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#### CHAPTER IV.

##### PARTIES TO ACTIONS FOR NEGLIGENCE.

Sec. 53. Persons directly or indirectly injured.

54. Who may sue on breach of contract.

54 a. Private actions on public obligations.

55. Reversioners and mortgagees.

56. Landlords and tenants.

57. Infants, and persons of unsound mind.

58. Joint liability of trespassers and others.

§ 53. As a matter of course, the person directly injured by negligence is a proper plaintiff; but it is not necessary, in order to maintain such an action, that the plaintiff should have been thus *directly* injured. An indirect injury will suffice to give a cause of action. But the injury must be a proximate result of the defendant's fault. Thus, a master can recover compensation for a tort which deprives him of the labor of his servant,<sup>1</sup> although the serv-

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<sup>1</sup> Hall v. Hollander, 4 Barn. & Cr. 660; Martinez v. Gerber, 3 Man. & G. 88; 3 Scott N. R. 386; Gough v. Bryan, 2 Mees. & W. 770; Hodsoll v. Stallebrass, 11 Ad. & El. 301; Gilbert v. Schwenck, 14 Mees. & W. 488; Woodruff v. Washburn 3 Denio, 369.

ant can recover separate damages for his own personal loss; and it is upon this ground that a parent can recover for an injury to his child.<sup>1</sup> And a bailee can recover for the consequent loss of his hire.<sup>2</sup> But a life insurance company cannot recover from a railroad company the amount paid by the former upon the death of a person killed by the negligence of the latter company,<sup>3</sup> since the injury would not have obliged the insurers to pay any thing, if they had not voluntarily undertaken to do so.

§ 54. Negligence which consists merely in the breach of a contract will not afford ground for an action by any one who is not a party to the contract, nor a person for whose benefit the contract was avowedly made.<sup>4</sup> But where, in omitting to perform a contract, either in whole or in part, one does an act which would be wrongful, even if no such contract had been made, he is liable to any person proximately injured thereby. This seems to us to be the correct rule, and one which is consistent with all the decisions, though the opinions of the courts state the abstract doctrine in different terms.<sup>5</sup> Therefore, where one employed to construct a coach has made it so badly that it cannot sustain the ordinary jar of travel, he is not liable to a stranger injured by its breaking down.<sup>6</sup> One employed to put up a chandelier in a house is not liable to

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<sup>1</sup> See *Gilligan v. N. Y. & Harlem R. Co.*, 1 E. D. Smith, 453; *Pennsylvania R. Co. v. Kelly*, 31 Penn. St. 372; *Oakland R. Co. v. Fielding*, 48 Id. 320.

<sup>2</sup> *McGill v. Monette*, 37 Ala. 49.

<sup>3</sup> *Conn. Life Ins. Co. v. N. Y. & N. Haven R. Co.*, 25 Conn. 265.

<sup>4</sup> Thus, a master cannot sue upon injuries suffered by the servant from the negligence of a carrier of such servant (*Alton v. Midland R. Co.*, 19 C. B. [N. S.] 213; *Fairmount &c. R. Co. v. Stutler*, 54 Penn. St. 375).

<sup>5</sup> In *Thomas v. Winchester* (6 N. Y. 397), the distinction was said to be between acts which were dangerous to human life, and those which were not. But in *Winterbottom v. Wright* (10 Mees. & W. 109), and *George v. Skivington* (Law. Rep. 5 Exch. 1), the rule will be found nearly as we have stated it above.

<sup>6</sup> *Winterbottom v. Wright*, 10 Mees. & W. 109.



guests of the house for the fall of the chandelier through defects in his work;<sup>1</sup> and one who sells a defective article is not, in the absence of fraud, liable to a stranger for its defects,<sup>2</sup> unless they are such as to make it wrongful for him to part with the article in that condition. But, if the act of negligence is one which in its nature endangers human life, as where poison is sold, labeled as an innocent drug, the act is inherently wrongful, and the party in fault is liable to any one misled or otherwise involved in injury through his negligence.<sup>3</sup>

§ 54 a. As any person for whose benefit a contract was expressly made can sue for a breach thereof, though not himself a party to the contract,<sup>4</sup> it follows that when a contract is made with the state for the benefit of a class of persons, any one of that class, specially injured by a breach of the contract, may sue thereon.<sup>5</sup> So, if a specific duty is imposed upon any person by law, or by a legal authority, an action may be sustained against him by any person who is specially injured by his failure to perform that duty.<sup>6</sup> Both classes of actions are regarded as actions

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<sup>1</sup> *Collis v. Selden*, Law Rep. 3 C. P. 495.

<sup>2</sup> *Longmeid v. Holliday*, 6 Exch. 761. Where a seller gives a false and fraudulent warranty, he is liable to a third person injured by his fraud (*Levy v. Langridge*, 4 Mees. & W. 387; affirming S. C., 2 Id. 519).

<sup>3</sup> *Thomas v. Winchester*, 6 N. Y. 397. In *George v. Skivington* (Law Rep. 5 Exch. 1), the defendant was held liable for injuries sustained by the plaintiff from a mixture carelessly prepared, though not dangerous to life, and bought by the plaintiff's husband.

<sup>4</sup> *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178.

<sup>5</sup> *Robinson v. Chamberlain*, 34 N. Y. 389; *Fulton Ins. Co. v. Baldwin*, 37 N. Y. 648; *Weet v. Brockport*, 16 N. Y. 161, note; *Mayor &c. of Lynn Regis v. Henley*, 1 Bing. N. C. 222; *Jones v. New Haven*, 34 Conn. 1; *Weightman v. Washington*, 1 Black, 39; *Phillips v. Commonwealth*, 44 Penn. St. 187; *Sawyer v. Corse*, 17 Gratt. 230. The cases of *Fish v. Dodge* (38 Barb. 163) and *Minard v. Mead* (Id. 174 n.) are overruled.

<sup>6</sup> *Adsit v. Brady*, 4 Hill, 630; *Clayburgh v. Chicago*, 25 Ill. 535; *Wendell v. Troy*, 39 Barb. 329; 4 Keyes, 261; see *Robinson v. Chamberlain*, *supra*.

in tort for negligence; although the former class would seem to be technically founded on contract.

§ 55. One who has a fixed reversionary interest in property has a right to sue for any injury to such property which will depreciate its value when it comes into his hands,<sup>1</sup> and is entitled to recover damages to the extent of such probable depreciations.<sup>2</sup> Nor is it any bar to his recovery, that the injury of which he complains is one which may possibly cease before he comes into possession, if it is in its nature permanent, and will probably continue, in the absence of some affirmative action.<sup>3</sup> A mere trespass, however, having no permanent effect upon the property, constitutes no cause of action in favor of a reversioner, even though committed for the purpose of claiming title,<sup>4</sup> much less where there was no such intention, as in a case of mere negligence there could not be. Nor does the continuous repetition of an injury make it permanent, within the meaning of this rule. Its continuance, however probable, cannot afford a present cause of action to the reversioner, if it depends upon the affirmative exercise

<sup>1</sup> *Jesser v. Gifford*, 4 Burr. 2141; *Tomlinson v. Brown, Sayer*, 215. Building an adjoining house so that the rain drips upon the reversioner's land, is a permanent injury within this rule (*Tucker v. Newman*, 11 Ad. & El. 40). So is an excavation, causing a falling of the soil (*Raine v. Alderson*, 4 Bing. N. C. 702; 6 Scott, 691).

<sup>2</sup> *Ib.*

<sup>3</sup> Thus, in an action by a reversioner for the obstruction of ancient lights, it was objected that the obstruction might be removed, either by the voluntary act of the defendant, or by process of law, before the reversioner came into possession. But this objection was overruled (*Jesser v. Gifford*, 4 Burr. 2141; *Tomlinson v. Brown, Sayer*, 215). To the same effect see (per Tenterden, C. J.) *Shadwell v. Hutchinson*, 4 Carr. & P. 333; *Moo. & M.* 350.

<sup>4</sup> Thus, a landlord cannot maintain an action for a mere entry upon his tenant's land, if no injury is done to the land itself; even though the entry was made for the purpose of claiming title (*Baxter v. Taylor*, 4 Barn. & Ad. 72). An apparently opposing opinion of Tenterden, C. J., in *Young v. Spencer* (10 Barn. & Cr. 152), has been restricted in its effect to the mutual relations of landlord and tenant (*Baxter v. Taylor*, 4 Barn. & Ad. 72; *Mumford v. Oxford, Worcester &c. R. Co.*, 1 Hurlst. & N. 34).

of human volition.<sup>1</sup> The owner of a reversionary interest in personal property has the same right of action for an injury thereto as in the case of real property.<sup>2</sup> But though a mortgagee may sue for a trespass<sup>3</sup> upon or conversion<sup>4</sup> of the mortgaged property, he cannot maintain an action for a merely negligent injury to the mortgaged premises, even though he has thereby lost his security.<sup>5</sup>

§ 56. Questions frequently arise as to the joint and several liability of a landlord or owner and his tenants. The rule seems to be that if the injury results from the negligence of the owner, either in constructing or upholding the property, he is responsible, but that he is not, in general, responsible for the negligence of the tenant, in the use of it. If an injury results from the negligence of the tenant, in any manner, the tenant is liable. But both the landlord and the tenant may be liable for the same injury, the former for the negligent construction, and the latter for the negligent use, of the premises.<sup>6</sup> The owner is, of course, answerable for nuisances erected on the premises when he lets them to his tenant;<sup>7</sup> but he is not answerable for a nuisance erected afterward on the premises by his tenant, unless he renews the lease thereafter,<sup>8</sup> nor, in the

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<sup>1</sup> Thus, the nuisance of perpetual hammering in a railway company's workshop, although morally certain to continue, affords no ground for an action by the landlord of the adjoining land for the injury to his reversion (*Mumford v. Oxford, Worcester &c. R. Co.*, 1 Hurlst. & N. 34).

<sup>2</sup> *Hawkins v. Pythian*, 8 B. Monr. 515.

<sup>3</sup> *Earle v. Hall*, 2 Metc. 353; *Page v. Robinson*, 10 Cush. 99; *Saunders v. Reed*, 12 N. H. 558.

<sup>4</sup> *Bellune v. Wallace*, 2 Rich. Law, 80; *Burton v. Tennehill*, 6 Blackf. 470. See *Coles v. Clarke*, 3 Cush. 399; *White v. Webb*, 15 Conn. 302.

<sup>5</sup> *Gardner v. Heartt*, 3 Denio, 232. But see *Lane v. Hitchcock*, 14 Johns. 213.

<sup>6</sup> Per Woodruff, J., *Eakin v. Brown*, 1 E. D. Smith, 44.

<sup>7</sup> *Rosewell v. Prior*, 12 Mod. 635; 1 Ld. Raym. 713; *Congreve v. Smith*, 18 N. Y. 79, 84. And so where the nuisance was erected by him on the land of another, and he had no right to enter for the purpose of removing it (*Thomson v. Gibson*, 7 Mees. & W. 456; *Fish v. Dodge*, 4 Denio, 312).

<sup>8</sup> *Rex v. Pedley*, 1 Ad. & E. 827. In that case there was only a tenancy from year to year, and the landlord chose to renew the tenancy after the tenant had

absence of a covenant in the lease,<sup>1</sup> for the consequences of the natural decay of the premises,—as where fences are suffered by the tenant to fall into decay, whereby a stranger's cattle stray and are injured.<sup>2</sup> He is not responsible for injuries happening subsequent to his alienation of his entire title, though resulting from a nuisance created by him. The person in possession is the one who is liable.<sup>3</sup> But if the owner constructs a nuisance,—*e. g.*, an excavation underneath the sidewalk connecting with his premises,—he must, at his peril, notwithstanding a demise of the premises, keep it in such a condition as that the safety of travelers shall not be impaired by its being there. And the tenant of the premises, because he uses and enjoys the benefit of such excavation, is bound to the same vigilance. Therefore, where one is injured by falling into a coal hole underneath the sidewalk in front of the premises, by reason of the cover being left unfastened, he has his remedy against the owner and the tenant jointly.<sup>4</sup> The

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erected the nuisance. Held, that the landlord was liable (see *Gandy v. Jubber*, 5 Best & S. 78, 485; *Owings v. Jones*, 9 Md. 108).

<sup>1</sup> *Payne v. Rogers*, 2 H. Blacks. 350.

<sup>2</sup> *Cheetham v. Hampson*, 4 T. R. 318; *Coupland v. Hardingham*, 3 Campb. 398; *Daniels v. Potter*, 4 Carr. & P. 266; *Staples v. Spring*, 10 Mass. 74.

<sup>3</sup> *Blunt v. Aiken*, 15 Wend. 522. But see *Davenport v. Ruckman*, 10 Bosw. 20.

<sup>4</sup> *Irvin v. Fowler*, 5 Robertson, 482; 4 Id. 138. In this case, the judge charged the jury as follows: "The court places the ground of the liability in this case upon the duty which devolves upon any one who uses or receives profits from a dangerous construction or excavation placed in a public highway (over which every one has a right to travel), to protect the public from accident; and it says, that if any one either constructs, or uses, or receives profit from the use of such an excavation or construction, which is called in law a nuisance, must, at his peril, keep it in such a position as that the safety of the traveler shall not be impaired by the fact of its being there. The sidewalk must be just as safe as if the thing had not been there. It is at their peril to keep it so, and it is upon that ground that this court has held that these defendants are liable; the tenants, as using it in putting in coal; the landlord, as having received rent for the use of it; and it is because the action is based and sustained on that ground, that all evidence of carelessness on the one side, or of good or bad construction, so far as the landlord is concerned, on the other, has been excluded, their liability resting on the above broad ground." One who comes into possession of premises, attached to which there is an excavation encroaching upon the highway, may be regarded as so sanctioning it as to be liable for an injury sus-

tenant of a part of a building, not guilty of negligence or malfeasance, is not liable to a tenant of another portion of the same building for damages resulting from the defective construction of the demised premises, or from the insufficiency of a fixture therein.<sup>1</sup>

§ 57. Infants and persons of unsound mind are liable for injuries caused by their tortious negligence;<sup>2</sup> and, so far as their responsibility is concerned, they are held to the same degree of care and diligence as persons of sound mind and full age. This is necessary, because otherwise there would be no redress for injuries committed by such persons, and the anomaly might be witnessed of a child, having abundant wealth, depriving another of his property without compensation. But persons incapable of contracting cannot be held liable for mere neglect to perform their contracts.

§ 58. Persons who co-operate in an act directly causing injury are jointly liable for its consequences, if they acted in concert,<sup>3</sup> or united in causing a single injury, even though acting independently of each other.<sup>4</sup> Thus the proprietors of two vehicles, both of which are driven so carelessly as to injure a third person by their collision,

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tained by a passer-by in consequence of it (*Davenport v. Ruckman*, 10 Bosw. 20). It has been held, in a case where the tenant had surrendered the premises to the landlord for a brief period to enable him to make repairs, that the tenant was not liable because he was not in possession at the time, and the landlord was liable, without reference to his liability as owner, for the reason that he was then in possession (*Leslie v. Pound*, 4 Taunt. 652).

<sup>1</sup> *Eakin v. Brown*, 1 E. D. Smith, 36.

<sup>2</sup> So held as to infants (*Conklin v. Thompson*, 29 Barb. 218; *Bullock v. Babcock*, 3 Wend. 391; *Burnard v. Haggis*, 14 C. B. [N. S.] 45; see *Hartfield v. Roper*, 21 Wend. 615; *Campbell v. Stakes*, 2 Id. 137); and the rule is the same as to lunatics, idiots, &c. (see *Williams v. Cameron*, 26 Barb. 172; *Hartfield v. Roper*, 21 Wend. 615; *Bullock v. Babcock*, 3 Wend. 391; *Weaver v. Wood*, Hobart, 134).

<sup>3</sup> *Guille v. Swan*, 19 Johns. 381; see *Williams v. Sheldon*, 10 Wend. 654; *Hawksworth v. Thompson*, 99 Mass. 77.

<sup>4</sup> *Colegrove v. N. Y. & Harlem R. Co.*, 6 Duer, 382; 20 N. Y. 492.

are jointly liable for the damage done, although in no way connected in business together.<sup>1</sup> And so the owners of a party wall dividing their two lots, are jointly liable for injuries sustained in consequence of its falling, through decay and want of repair.<sup>2</sup> And where a master is liable for the tortious negligence of his servant, the latter is jointly liable with him.<sup>3</sup> But persons who act separately, each causing a separate injury, cannot be made jointly liable, even though the injuries thus committed are all inflicted at one time, and precisely similar in character.<sup>4</sup> Thus, separate owners of animals cannot at common law be made jointly liable for different injuries committed by their animals respectively, though all happening as part of a single transaction.<sup>5</sup> And persons who separately rent different portions of a single building are not jointly liable for their negligent use of the premises.<sup>6</sup> Where the lease of a pier contained a covenant on the part of the lessee that he would keep the pier in as good repair as it then was, but reserved to the lessor the right to use as much of the pier as his business might require, it was held that the lessor was liable jointly with the lessee, for injuries to the plaintiff resulting from its nonrepair, both being in its joint possession.<sup>7</sup>

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<sup>1</sup> *Ib.* And where A. lent a wagon to B. and C., who each furnished a horse, and then at their invitation A. rode with them, B. driving, it was held that all three were jointly liable for the negligence of B. in driving too fast (*Bishop v. Ely*, 9 Johns. 294). To the same effect is *Davey v. Chamberlain*, 4 Esp. 229.

<sup>2</sup> *Klander v. McGrath*, 35 Penn. St. 128.

<sup>3</sup> *Phelps v. Wait*, 30 N. Y. 78; *Michael v. Alestree*, 2 Levinz, 172.

<sup>4</sup> *Williams v. Sheldon*, 10 Wend. 654.

<sup>5</sup> *Auchmuty v. Ham*, 1 Denio, 495; *Van Steenburgh v. Tobias*, 17 Wend. 562. See chapter on ANIMALS.

<sup>6</sup> Persons who occupy the same building, and have each the privilege to use the water pipes, under their own right of use or occupation, can be held responsible for damages resulting from their negligent use or care, only on proof of negligence on their own part; and neither is responsible for the negligence of the others, though they may be jointly liable where their right is joint (*Moore v. Goedel*, 7 Bosw. 591; see *Eakin v. Brown*, 1 E. D. Smith, 36; see *Payne v. Rogers*, 2 H. Blacks. 349).

<sup>7</sup> *Cannavan v. Conklin*, 1 Daly, 509.

## CHAPTER V.

### LIABILITY OF MASTERS FOR THE ACTS OF THEIR SERVANTS.

- SEC. 59. The general rule stated.
60. None but master or principal liable for negligence of others.
  61. Master's liability for servant's acts not greater than for his own acts.
  62. Master not liable for acts outside of employment.
  63. What acts are within employment.
  64. Servant's abuse of power.
  65. Master may be liable for servant's willful acts.
  66. Ostensible authority for willful acts.
  67. Willful acts, when consequence of negligence.
  68. Disobedience of servant.
  69. Master not liable criminally or for a penalty.
  70. Master's liability for sub-agent's acts.
  71. Ownership of vehicle implies responsibility.
  72. Responsibility implied from ownership of other property.
  73. Who is to be deemed a master.
  74. Liability for servant hired out.
  75. Liability of trustees.
  76. Contractor, what.
  77. When a contractor becomes a servant.
  78. Effect of employer's control over contractor.
  79. Employer not liable for contractor's negligence.
  80. Same principle applicable to subcontractors and part contractors.
  81. Employer not liable for contractor's servants.
  - 81a. Negligence of pilots.
  82. Rule as to owners of real property.
  83. Employer is liable for his own neglect.
  84. When employer is liable for contractor's acts.
  85. The same rules applicable to the relation of principal and agent.

§ 59. A master is responsible to third persons for the negligence of his servants in the course of their employment as such,<sup>1</sup> to the same extent as if the act were his

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<sup>1</sup> *Gass v. Coblenz*, 43 Mo. 377; *Evansville &c. R. Co. v. Baum*, 26 Ind. 70; *Puryear v. Thompson*, 5 Humph. 397; *O'Connell v. Strong*, Dudley, 265; *Harpell v. Curtiss*, 1 E. D. Smith, 78; *McCahill v. Kipp*, 2 Id. 413. A servant of the defendant, without his knowledge, piled wood for him in a place where the defendant had been accustomed to place it for nearly forty years; and the plaintiff's horse was injured by running on the wood. Held, that if the servant's act was wrongful, the master was liable (*Harlow v. Humiston*, 6 Cow. 189). The plaintiff authorized A. to receive

own,<sup>1</sup> and is responsible even for their willful acts,<sup>2</sup> though unauthorized<sup>3</sup> or forbidden<sup>4</sup> by him, so far as such acts deprive a third person of a benefit which the master was bound to confer upon them,<sup>5</sup> or when such acts can for

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a dividend for him from the defendants. That dividend was remitted by the defendant in a draft on B., which reached A.'s office on August 17. A. had left town without leaving instructions as to any draft, and did not return till the 25th; and on the 24th the drawees had stopped payment. Held, in an action against the drawer, that the plaintiff was responsible for the negligence of his agent, A., in not presenting the draft earlier (*Brady v. Little Miami R. Co.*, 34 Barb. 250). The decisions in respect to the liability of a master for the acts or default of his slaves were somewhat conflicting, especially in South Carolina. At one time, it seems to have been held that the master was less responsible for their acts than for the acts of free servants (*Wingis v. Smith*, 3 McCord, 400; *Snee v. Trice*, 2 Bay, 345; see *Cawthorne v. Deas*, 2 Porter, 276; *Parham v. Blackwelder*, 8 Ired. [N. C.] Law, 446), at another time, that the master must answer for all the acts of his slaves; but finally the courts held the same principles applicable to the master's liability for slaves as for free servants (*Parker v. Gordon*, Dudley, 270; *Drayton v. Moore*, Id. 268; *O'Connell v. Strong*, Id. 265; see *Campbell v. Staiert*, 2 Murphy, 389).

<sup>1</sup> A master will not be liable for an act of his servant, which would not have constituted any cause of action against him, if done by himself (*Russell v. Irley*, 13 Ala. [N. S.] 131; *Poulton v. Southwestern R. Co.*, Law Rep. 2 Q. B. 534; see *post*, § 61).

<sup>2</sup> See *post*, § 65.

<sup>3</sup> *Carman v. Mayor &c. of New York*, 14 Abb. Pr. 301; *Luttrell v. Hazen*, 3 Sneed, 20. The defendants sent a barge, under the management of their lighterman, to a wharf, for the purpose of being loaded. He was unable to get up to it, in consequence of a barge belonging to the plaintiffs lying in the way, without any one in charge of it. The foreman of the wharf told him to shove the other barge away, as it had no business there, and to bring his alongside. He then moved the plaintiffs' barge from the wharf, and made it fast to a pile in the river. When the tide went down, the plaintiff's barge settled upon a projection in the river, and was injured. Held, that the defendants were responsible, as the lighterman, in doing the act complained of, was acting as their servant (*Page v. Defries*, 7 Best & S. 137).

<sup>4</sup> *Weed v. Panama R. Co.*, 17 N. Y. 362; *Limpus v. London Omnibus Co.*, 1 Hurlst. & C. 526; *Southwick v. Estes*, 7 Cush. 385; *Armstrong v. Gilman*, 5 Gilman, 509; *Priester v. Angley*, 5 Rich. Law, 44. These cases are more fully stated elsewhere.

<sup>5</sup> Where a conductor willfully, negligently, and contrary to orders, detained a train of cars upon the road, it was held that the railroad company was liable for an injury caused to a passenger thereby (*Weed v. Panama R. Co.*, 17 N. Y. 362). A railroad passenger purchased a ticket from one of the company's agents, and before he reached his destination the conductor expelled him from the car. Held, that the company was liable for the conductor's act (*Milwaukee & Miss. R. Co. v. Finney*, 10 Wisc. 388). *Dixon, C. J.*, said: "In this case, the contract between the plaintiff and defendants was, that, in consideration of his having paid to them the fee demanded, they were carefully to transport him in their cars. It is no defense for the breach of this contract that it was occasioned by the willful act of their agent" (*Ib.*) Where the de-



any other reason be justly said to have occurred in the course of the servants' employment. There is no distinction in this respect between a servant who is a general agent, and one who is employed for a particular purpose; although that distinction has been sometimes taken.<sup>1</sup> The fact that a servant is employed only for a single purpose may be material in determining whether his negligence happens in the course of his employment; but if it does, the master's liability is exactly the same as if the servant were a general agent.

§ 60. No one is liable for the negligence of another person, unless the latter is his servant or agent.<sup>2</sup> The

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fendant's servants refused to allow the plaintiff to send his grain by the defendant's cars, it was held that, if the servant gave the cars, contrary to the defendant's custom, to persons not rightfully entitled to them, to the exclusion of the plaintiff, the defendant was liable. A judgment for the plaintiff was, however, reversed on account of excessive damages (*Galena & Chicago R. Co. v. Rae*, 18 Ill. 488). Where a bank increased the amount of its stock, and its agents unlawfully refused to allow a stockholder to subscribe for his proportion of the new stock, the bank was held liable (*Gray v. Portland Bank*, 3 Mass. 365).

<sup>1</sup> Thus, in *Wilson v. Peverly* (2 N. H. 548), Woodbury, J., said: "When a general agent is employed, then all acts within the scope of his agency are the master's acts; but when a laborer works under the special orders of the master, the master is responsible only for his skill and care in executing those orders." In that case, a day laborer was instructed by his master to harrow one field and watch a fire in another; and, before harrowing, he undertook, according to the usual course of good husbandry, to burn a pile of rubbish which was in it. With that purpose in view he carried fire from the former field to the latter, and, in doing so, negligently dropped coals which set the plaintiff's property on fire. Held, that the master was not responsible, as the servant was not acting under his express orders. In *Oxford v. Peter* (28 Ill. 434), the appellant directed a boy to drive out all the cattle he found in a certain field. The boy, having driven out a steer, chased it, together with the plaintiff's cow, until the cow stumbled, and was killed. Held, that the boy acted in excess of his authority, and therefore that the appellant was not liable. Walker, J., said: "Where the directions of the master are general as to the business in which the servant is employed, he confides in his discretion; but when the directions are specific, it is otherwise. \* \* \* In the latter case, if the servant exceeds the specific directions, the act performed beyond the authority becomes his own, for which the master is not liable. The act then becomes willful on the part of the servant, and is not in furtherance of the business of the master."

<sup>2</sup> To render one person liable for the negligence of another, the relation of master and servant, or principal and agent, must exist between them (*Stevens v. Squires*, 6 N. Y. 435; *McGuire v. Grant*, 1 Dutch. 356). As to who is deemed to be a servant, see section 73.

owner of property, whether real or personal, cannot be held responsible, on the mere ground of such ownership, for an injury suffered by another person from the contact of such property with his person or property.<sup>1</sup> The injury must amount to a trespass on the part of the owner of the thing doing the mischief, or must be the result of his or his servant's negligence, before he can be made to answer for it. The lessor of property of any kind, as, for example, the lessor of a ferry, the franchise of which has been granted to him, is not responsible for the negligence of the lessee or his servants in its management.<sup>2</sup> And even where the law forbids certain work to be done without the supervision of a particular person, yet if it is in fact done by another person without such supervision, the former is not liable for the negligence of the latter in doing the work,<sup>3</sup> except as an incidental damage arising out of a wrongful neglect to supervise the work.

§ 61. It has been held that a servant can have no implied authority to do that which it could not be lawful, under any circumstances, for either him or his employer to do.<sup>4</sup> Certainly no such authority will be implied from a

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<sup>1</sup> See *Kelly v. Mayor &c. of New York*, 11 N. Y. 432; *Pack v. Same*, 8 Id. 222; *Gourdier v. Cormack*, 2 E. D. Smith, 254; *Higgs v. Maynard*, 14 Weekly Rep. 610; 12 Jur. [N. S.] 705; 14 Law Times [N. S.] 332. The plaintiff was thrown out of his wagon by a collision with a railroad car, which was drawn by horses of, and driven by a driver employed by, the defendant, but which was the property of another company. Held, that plaintiff's action was properly brought against the owners of the horses and the employers of the driver (*Weyant v. N. Y. & Harlem R. Co.*, 3 Duer, 360). The same decision was made where an injury was done by a canal-boat, belonging to the defendant, but run by another person (*Blattenberger v. Schuylkill Co.*, 2 Miles, 309).

<sup>2</sup> The defendant had a license to run a ferry, and leased the same to another, and, through the negligence of the lessee's servants, one A. was drowned. Held, that the administrator of A. could not recover against defendant, as the relation of master and servant did not exist between the lessee and defendant (*Blackwell v. Wiswall*, 24 Barb. 355). A similar decision was made in a like case in Vermont, where the lessee paid half his profits as rent for the franchise (*Felton v. Deall*, 22 Verm. 171).

<sup>3</sup> *Glover v. East London Waterworks Co.*, 17 Law Times [N. S.] 475; 16 Weekly Rep. 310.

<sup>4</sup> *Poulton v. Southwestern R. Co.*, Law Rep. 2 Q. B. 534. In this case, the plaintiff

general authority to do lawful acts of the same generic nature. But where a servant is authorized to do acts which may or may not be lawful, according to circumstances, the master may be liable for such an act, though unlawfully done.<sup>1</sup> And of course where express authority is given to do an unlawful act, there is an implied authority to do all acts necessary to effect the main purpose.

§ 62. A master is not responsible for any act or omission of his servants, which is not connected with the business in which they serve him, and does not happen in the course of their employment.<sup>2</sup> Though in general a master is responsible for the manner in which the servant executes his orders, and for the servant's negligence in selecting means by which they are to be carried out, yet the master is not bound to anticipate a perfectly gratuitous trespass on the part of a servant, such, for example, as his entering,

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iff having taken a horse to an agricultural show by railway, was entitled, under arrangements advertised by the company, to take the horse back free of charge on the production of a certificate. The plaintiff accordingly produced a certificate, and the horse was put into a box without payment or booking, and the plaintiff, having taken a ticket for himself, proceeded by the same train. At the end of the journey the station-master demanded payment for the horse, and the plaintiff refusing to pay was detained in custody by two policemen under the orders of the station-master, until it was ascertained by telegraph that all was right. An action having been brought against the company for false imprisonment, it was held, that although a railway company has power to apprehend a person traveling on the railway without having paid his fare, it has only power to detain the goods for nonpayment of the carriage; consequently, as the company had no power to detain the plaintiff on the assumption that he had wrongfully taken the horse by the train without paying, there could be no authority implied from the company to the station-master to detain the plaintiff on this assumption, and the company was therefore not liable for this act of the station-master. See *Mali v. Lord*, 39 N. Y. 381; *Russell v. Irley*, 13 Ala. [N. S.] 131; and our chapter on MUNICIPAL CORPORATIONS.

<sup>1</sup> See section 65; *Limpus v. London Omnibus Co.*, 1 Hurlst. & C. 526; *Regina v. Stephens*, Law Rep. 1 Q. B. 702.

<sup>2</sup> *Shaw v. Reed*, 9 Watts & S. 72; *Harris v. Mabry*, 1 Ired. [N. C.] Law, 240; *Lowell v. Boston & Lowell R. Co.*, 23 Pick. 24; *Aycrigg v. N. Y. & Erie R. Co.*, 1 Vroom, 460; *Yates v. Squires*, 19 Iowa, 26. A master cannot be made liable for the willful or intentional injuries or trespasses of his servants, and not committed in their regular employment (*Snodgrass v. Bradley*, 2 Penn. 43; *McKeon v. Citizen's R. Co.*, 42 Mo. 80).

without necessity, upon a stranger's land. No presumption of authority arises from the fact of the act having been done for the master's benefit, or from his silence in regard to it.<sup>1</sup>

§ 63. In determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act is done while the servant is at liberty from his service, and pursuing his own ends exclusively, there can be no question of the master's freedom from all responsibility,<sup>2</sup> even though the injury complained of could not have been committed without the facilities afforded to the servant by his relation to his master.<sup>3</sup> This, however, is just as true of mere negligence as

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<sup>1</sup> *Church v. Mansfield*, 20 Conn. 284.

<sup>2</sup> A servant of a railroad company was driving the company's horses home in the usual way, when another servant of the company, not at the time actually engaged in its service, struck them, rendering them unmanageable, in consequence of which they ran over the plaintiff. Held, that the misconduct of the latter servant in striking the horses was an act of wanton mischief, for the consequences of which the company was not responsible (*Weldon v. N. Y. & Harlem R. Co.*, 5 Bosw. 576).

<sup>3</sup> Where a carman, whose duty it was to attend to putting up the horse and cart of his employer, after getting the key of the stable, drove in an opposite direction without the consent of his employer, and, on his way back, injured a third person, it was held that his employer was not liable (*Mitchell v. Crassweller*, 13 C. B. 237; overruling *Sleath v. Wilson*, 9 Carr. & P. 607). And where, before finishing the journey upon which he was sent, a carman started in a different direction for a purpose unconnected with his master's business, it was held that the master was not liable for an injury caused by his negligence on the way (*Storey v. Ashton*, Law Rep. 4 Q. B. 476). A master, who permits his servant to go to a fair for his own pleasure with the master's horse and cart, is not liable for damages arising from the servant's negligent management of the horse (*Bard v. Yohn*, 26 Penn. St. 482). But where a servant, driving his master's cart, on his master's business, made a detour from the direct road for some purpose of his own, his master was nevertheless held liable for an injury done by him on the way (per Parke, J., *Joel v. Morison*, 6 Carr. & P. 501). It is at least doubtful whether this case is not overruled by the later decisions above cited. Where the master of a ferry-boat left the pier without authority, and took a burning barge in tow, the owners of the boat were held not to be liable for injuries done by the barge (*Aycrigg v. N. Y. & Erie R. Co.*, 1 Vroom, 460). Where B., a harbor master, ordered C. to moor the plaintiff's vessel in the middle of a stream, and after having executed such orders, C. took the plaintiff's boat to return in, without any authority from the defendant, and abandoned it on the shore, it was held that B. was not responsible for the loss of the boat (*Brown v. Purviance*, 2 Harr. & G. 316).

of a willful wrong. But the fact that the servant was, at the time of the injury, engaged in the service of his master, is not conclusive of the master's liability. The act causing the injury must have been one within the scope of the authority which the servant had from the master, or which the master gave the servant reasonable cause to believe that he had, or which servants employed in the same capacity usually have.<sup>1</sup> The mere fact that the injury complained of was caused by the negligence of the servant in the performance of an act which, taken *per se*, was within the scope of his employment, will not impose a liability upon the master, if the act was merely incidental to the servant's attempt to perform an act entirely beyond the scope of his authority. Thus, where a servant, having authority to light fires in the house, but not to clean the chimneys, lit a fire for the sole purpose of cleaning a chimney, it was held that her master was not liable for an injury caused by her negligence in lighting the fire.<sup>2</sup> On the

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<sup>1</sup> Where the plaintiff's slave was on board a steamboat, as passenger, and the second engineer, by negligently discharging a gun, wounded him while he was upon a lighter alongside of the steamboat, it was held that the captain was not responsible (*McClenaghan v. Brock*, 5 Rich. Law, 517). And even where the owner of a vessel kept a small cannon on board, for the purpose of firing salutes, but gave orders that it should not be used in his absence, it was held that he was not liable for its use in firing a salute during his absence (*Haack v. Fearing*, 5 Robertson, 528; 4 Abb. [N. S.] 297; 35 How. Pr. 259). Where the defendant made a special contract to transport the goods of A., and sent his servant to fetch them, and them only, and the servant undertook to carry also the goods of B., and, on the way, embezzled part of them, it was held that the defendant was not liable for the theft, as the servant had exceeded his authority in bringing the goods of B. (*Satterlee v. Groot*, 1 Wend. 273). A van was standing in the street, with a gig behind it. The defendant's carriage coming up, and there not being room to pass, the defendant's driver got down from his box and laid hold of the van horse's head, causing him to move forward, by which a packing case on the van fell, and broke the shafts of the gig. Held, that defendant was not liable for this, as the driver was not acting in the employment of defendant when the accident occurred (*Lamb v. Palk*, 9 Carr. & P. 629). A master is not liable in damages for an injury to the plaintiff caused by the use of another's horse by the servant in doing an errand for his master, unless the horse was taken with the knowledge or consent of the master (*Goodman v. Kennell*, 3 Carr. & P. 167).

<sup>2</sup> *Mackenzie v. McLeod*, 10 Bing. 385. The principle of this decision is sound,

other hand, where a servant is allowed by his master to combine his own business with that of the master, or even to attend to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured by his negligence; but the master will be held responsible, unless it clearly appears that the servant could not have been, directly or indirectly, serving his master in the act, the negligent performance of which caused the injury.<sup>1</sup>

§ 64. It is quite possible for a servant to continue every moment serving his master, and yet so to abuse the facilities afforded him by his employment as to answer his own private ends, and to commit injuries wholly unconnected with his master's business. Thus, the captain of a vessel may sail in one of the most usual and direct paths for his destination, and yet wantonly run down another vessel on the way.<sup>2</sup> So the engineer of a train may purposely run over a man or an animal on the track, yet be every moment engaged in serving his employers in the ordinary way.<sup>3</sup> The injury thus wantonly committed

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although it may well be doubted whether the jury did not err in finding that the act was not within the scope of the servant's general or ostensible authority. Compare *Limpus v. London Omnibus Co.*, 1 Hurlst. & C. 526.

<sup>1</sup> Where the defendant's agent was driving with his own horse and gig, for the primary purpose of calling upon his own medical attendant, but proposed, with the knowledge of the defendant, though without his express assent, to stop on the way upon business for his principal, and, before reaching the latter place, through his negligent driving, ran against and killed plaintiff's horse, it was held that the defendant was liable (*Patten v. Rea*, 2 C. B. [N. S.] 606).

<sup>2</sup> *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479. In *Duggins v. Watson*, (15 Ark. 118), it was, however, held that the defendants were liable for a collision occasioned by the willful act of their servants "in the course of their employment." *Watkins, C. J.*, said in that case: "The only safe rule of law is that the master is liable for the tortious act of his servant engaged in his employment, though done willfully, without orders, or even against orders." This is going much further than is generally received as law.

<sup>3</sup> Where the defendant's servants ran a train of cars over the plaintiff's team at a road crossing, it was held that if the injury was caused by the servants' willful act, not in furtherance of the defendant's business, the defendant was not liable (*Ill-*

would in either case be distinguishable from the master's service, and he would not be liable therefor.<sup>1</sup>

§ 65. There is no such rule of law as that the master is not liable for the willful and wrongful acts of his servants; though such a doctrine has often been propounded in judicial opinions.<sup>2</sup> There are many cases in which a master must be held liable for such acts; and there are numerous decisions holding him so liable, which commend themselves to every man's sense of justice.<sup>3</sup> The true ground upon which a master avoids liability for most of the willful acts of his servants, when unauthorized by him, is that they are not done in the course of the servant's employment. When they are so done, the master is liable for them.<sup>4</sup>

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nois Central R. Co. v. Downey, 18 Ill. 259; S. P., *De Camp v. Mississippi & Mo. R. Co.*, 12 Iowa, 348). In that case, Skinner, J., said: "Case cannot be maintained against a corporation for injuries willfully and intentionally committed by its servants, and not produced in the course of their employment in doing the business for which they are employed. It is for the negligence, unskillfulness, or carelessness of the servant, where the injury is attributable to the conduct of the servant or agent, that the master or principal is liable in an action on the case."

<sup>1</sup> *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479, and other cases before cited. While the defendant's servant was driving a wagon, the son of the plaintiff (a minor) asked permission to ride. The servant said he might when he got up the hill; and the boy having caught hold of the wagon between the fore and hind wheels, the man started the horses into a trot, and the boy was thrown down and badly injured by the wheel passing over him. Held, that the master was not liable, the injury being willful (*Wright v. Wilcox*, 19 Wend. 343). The defendant instructed his servants to clear away some rubbish from a street, and the servants threw the rubbish into a sewer, whereby, upon the occurrence of a heavy rain, the plaintiff's cellar was overflowed. The jury having found that the act of the servants was unauthorized by the master, it was held that the defendant was not responsible (*Douglas v. Stephens*, 18 Mo. 362). This decision appears to us erroneous, unless indeed the act of the servants was a wanton breach of duty.

<sup>2</sup> Thus in *Harris v. Nicholas* (5 Munf. 483), it is said that a master is not in general responsible for a willful and unauthorized trespass committed by a servant in his employ. In *Moore v. Sanborne* (2 Mich. 519), Martin, J., said, "For the wanton violation of law by a servant, although occupied about the business of his employer, such servant is alone answerable." See also *McKeon v. Citizens' R. Co.*, 42 Mo. 80; *Lyons v. Martin*, 8 Ad. & El. 512.

<sup>3</sup> See *Weed v. Panama R. Co.*, 17 N. Y. 362; *Milwaukee & M. R. Co. v. Finney*, 10 Wisc. 388; *Carrigan v. Union Sugar Refinery*, 98 Mass. 577.

<sup>4</sup> *Limpus v. London Omnibus Co.*, 1 Hurlst. & C. 526. In that case it was held

§ 66. Where the master authorizes his servant to commit an act of violence or other aggression, under certain contingencies, he is liable for the consequences of such an act, when committed by the servant under the belief that the contingency had occurred, although in fact it had not.<sup>1</sup> This authority may of course be given by implication, as well as by express assent; and where an act of violence is usually authorized under particular circumstances, the master is liable for such an act on the part of the servant, if he believes, with any show of reason, that the circumstances authorizing it exist.<sup>2</sup> And where a contingency occurs which justifies the servant in using violence, yet if he uses unnecessary violence, or resorts to it in a time or a manner which make its consequences unnecessarily injurious, the master is liable, notwithstanding any precaution that he may have taken in his instructions to avoid the occurrence of such excessive or ill-timed use of the power intrusted to the servant. Thus a railroad company is liable for an injury suffered by a passenger who is put

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that the owner of an omnibus was liable for the willful act of its driver in driving against a rival omnibus, for the purpose of getting passengers away from it.

<sup>1</sup> The defendants directed the guards of their omnibuses to remove disorderly passengers. Deeming the plaintiff, who was an inoffensive person, disorderly, one of the guards ejected him carelessly and with excessive force. Held, that the guard had an implied authority to use his own discretion in determining who were disorderly, and therefore that the defendants were liable (*Seymour v. Greenwood*, 7 Hurlst & N. 356; 6 Id. 359). So it is to be deemed a part of the employment of the driver of a city railroad car to put a person off the platform of the car who may be there without right, or contrary to the regulations of the company; and it is by the company confided to such driver to determine whether a person on the platform is there without right, or contrary to such regulations; and a forcible and malicious ejection of a passenger from the car by the driver is an act in the course of his employment as a servant of the company (*Meyer v. Second Av. R. Co.*, 8 Bosw. 305).

<sup>2</sup> Defendant's servant, while driving his master's coach and horses, got entangled with the plaintiff's chariot and horses, and struck the horses in the chariot, in consequence of which they moved on, and the chariot was overturned. Held, that if defendant's servant struck the horses wantonly, the master was not liable, but if he struck them in the belief that it was expedient for the interest of his master, and with intent to extricate the chariot, the master was liable, though the servant judged wrongly of his duty (*Croft v. Alison*, 4 B. & Ald. 590). To the same effect, see *McManus v. Crickett* (1 East, 106).



off by its servant, while the cars are in motion, for refusing to pay his fare: it being the servant's duty to put such a passenger off the train, though not while it was in motion.<sup>1</sup> The same doctrine applies, as a matter of course, to any other willful wrong.<sup>2</sup> Where, however, a servant abuses the authority thus given to him, so as to use it as the mere pretext for a willful wrong, under circumstances which he knows were not contemplated by his master, the liability of the latter must depend upon the ostensible authority of the servant. If the circumstances were such as to give a reasonable man at the time cause to believe that the servant was acting under his master's authority, the master must be held responsible; but if a reasonable man could readily have seen that the servant was not in good faith serving his master, but was consciously using his orders as a mere pretext on which to indulge his private malice, the master should not be answerable.<sup>3</sup>

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<sup>1</sup> *Sanford v. Eighth Av. R. Co.*, 23 N. Y. 343; *Pennsylvania R. Co. v. Vandiver*, 42 Penn. St. 365. The defendant's overseer, having charge of a hired slave, and the right to compel him to work, was punishing the slave for refusal to work, when, upon the slave attempting to escape, the overseer struck him with a club and paralyzed him. Held, that the overseer was acting carelessly in the execution of his authority, and therefore that the defendant was liable to the slave's owner (*Jones v. Glass*, 13 Ired. [N. C.] Law, 305).

<sup>2</sup> "If one of the defendants, while engaged in the prosecution of the business of the other, carelessly or negligently set fire to the prairie, or even if he did so purposely, with a view to benefit or protect the interests of the employer, the latter would be liable for the consequences; but if he set out the fire from motives of malice or wantonness, the principal would not be liable, for that would be an abandonment of the business of the agency" (*Johnson v. Barber*, 5 Gilm. 425).

<sup>3</sup> Defendant's field adjoined the highway; and when animals trespassed thereon it was the duty of a servant of the defendant to impound them. This servant, seeing plaintiff's horse on the highway, intentionally drove him into the field, and there impounded him. Held, that the master was not liable for the servant's act (*Lyons v. Martin*, 8 Ad. & El. 512). Where the hirer of a slave directed his overseer to whip him till he humbled him, and the overseer killed him, it was held that if the overseer intended only to chastise the negro, and killed him by his negligence in using instruments of punishment, the owner could recover against the hirer; but if he intended to kill the negro, the defendant was not liable (*Puryear v. Thompson*, 5 Humph. 397). It seems to us that this doctrine affords too much room for the escape of a master from liability. In that case, if the slave had known that the over-

§ 67. A servant's negligence in his master's business may involve him in difficulties out of which he cannot escape without purposely doing an injury to a third person. In such a case, if a prudent regard to his master's interest would dictate such a course, he has an implied authority from his master to commit the injury, and the master is, of course, answerable for the consequences.<sup>1</sup> But where a servant commits a willful injury, for which he has neither actual nor ostensible authority, the master is not liable, except so far as concerns those negative consequences of which we shall presently speak.<sup>2</sup> Thus, a master-painter is not liable for the willful bespattering of a wall by his workmen;<sup>3</sup> nor an ordinary bailee for the

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seer was indulging in mere personal spite, he might have run away and appealed to his hirer for protection; while, so long as the slave believed the overseer to be fulfilling the wishes of the hirer, it would have been madness for him to attempt resistance or to appeal for mercy. Thus the owner of the slave (assuming the latter alternative to have been the fact, as no doubt it was) was deprived, by the position of authority which the hirer had given to his servant, of the protection which would have been otherwise afforded to his property by an appeal to the hirer personally. Where a prairie was set on fire by one of the defendants, who was the servant of the other, it was held that "if one of the defendants, while engaged in the prosecution of the business of the other, carelessly or negligently set fire to the prairie, or even purposely, with a view to benefit or protect the interests of the employer, the latter would be liable for the consequences; but if he set out the fire from motives of malice or wantonness, the principal would not be liable, for that would be an abandonment of the business of the agency" (*Johnson v. Barber*, 5 *Gilman*, 425).

<sup>1</sup> Where the wagon and horses of the defendant were driven so negligently by his servant as to put him into a position of danger, from which he could only escape by intentionally driving against plaintiff's wagon, by which plaintiff's horse was killed,—held, that defendant was liable, even though the act of his servant was willful, as it was the necessary consequence of that servant's prior negligence (*Wolfe v. Mersereau*, 4 *Duer*, 473; see also *Croft v. Alison*, 4 *B. & Ald.* 590).

<sup>2</sup> Where a slave, without the command or assent of the master, willfully cut timber upon land which he knew did not belong to his master, it was held that the master was not liable (*Campbell v. Staiert*, 2 *Murphy*, 389). "The master is liable for the carelessness of the servant. It is essential, however, that the damage should arise from the way and manner of doing the master's work. For suppose a servant takes offense at another man, and horsewhips him; although at the time he is conducting his master's cart, yet the damage is not inflicted in the doing of it; he is acting for himself, and the master is not liable." Per Lord Glenlee (*Baird v. Hamilton*, *Hay*, 29; 4 *S.* 790).

<sup>3</sup> *Garvey v. Dung*, 30 *How. Pr.* 315.

theft of his servants ;<sup>1</sup> nor the owner of a dog for the act of his servant in wantonly setting it to attack cattle.<sup>2</sup>

§ 68. Unintentional disobedience of a master's orders should always be deemed mere negligence, for the consequences of which, if the master would otherwise be liable, his orders should not protect him from liability.<sup>3</sup> Even the willful disobedience of a servant does not necessarily exonerate his master. Where the master is bound by law or

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<sup>1</sup> A bank receiving money on special deposit, for safe keeping only, is not responsible for an embezzlement thereof by its cashier (*Foster v. Essex Bank*, 17 Mass. 479). Parker, C. J., said: "To make a master liable for any act of fraud or negligence done by his servant, the act must be done in the course of his employment; and if he steps out of it to do a wrong, either fraudulently or feloniously, towards another, the master is no more answerable than any stranger" (*Ib.*)

<sup>2</sup> Where the servant of the defendant, without his knowledge, set his dog on the plaintiff's cattle; and defendant, as soon as he knew of it, ordered him to stop the dog, it was held to be the servant's willful act, and that the master was not liable (*Steele v. Smith*, 3 E. D. Smith, 321).

<sup>3</sup> Where a prairie is set on fire by a servant, under the direction of his master, the latter is responsible for all the consequences resulting from it, and cannot shield himself by showing that his instructions were not strictly pursued in doing the illegal act. And even where the act is legal, the master is responsible for the manner of performance, if done in the course of his employment and not in willful violation of his instructions (*Armstrong v. Cooley*, 5 Gilm. 509). Where the defendant directed his servant to cut trees along the line of his land, but neglected to inform the servant precisely where the line lay, and, in consequence, the servant cut timber upon another's land, it was held that the defendant was liable (*Luttrell v. Hazen*, 3 Sneed, 20; *Carman v. Mayor &c. of New York*, 14 Abb. Pr. 301). Caruthers, J., said: "It is not necessary that the principal or master should expressly direct or have knowledge of the act done; it is enough that the servant or agent was acting in the business of his superior" (*Luttrell v. Hazen*, 3 Sneed, 20). Where the defendants employed servants to remove obstructions from a stream, and in so doing the servants negligently, and contrary to their instructions, entered upon the plaintiff's land bordering upon the stream, and removed stones and earth therefrom, it was held that the defendants were liable (*Southwick v. Estes*, 7 Cush. 385). Shaw, C. J., said: "A servant may do great damage to another person, in the negligent and careless performance of his master's service, though against the master's will and contrary to his orders; yet this is a ground of action against the master" (*Ib.*) The defendant permitted his infant son to take a gun, to drive slaves from the defendant's cane patch, but cautioned him not to fire so as to hit any one. The son fired at one of the trespassers and killed him. There was evidence that the son did not intend to take the negro's life. Held, that the defendant was responsible (*Priester v. Angley*, 5 Rich. Law, 44). In that case Evans, J., said: "According to all the authorities, if a servant, in the course of his employment about his master's business, do any act whereby the property of another is injured, the master is liable."

contract to render a particular service to a third person, he is liable for the nonperformance of such service, although arising solely from the willful refusal of a servant to do his duty, whatever may be the motive. Thus, a carrier is liable for a delay in the transportation of persons<sup>1</sup> or property,<sup>2</sup> caused by the willful act of his servants, directly contrary to his orders, and even though committed for the purpose of injuring him.<sup>3</sup> And where a servant is employed to do a certain act, and is specially forbidden to adopt a particular method of doing it, yet willfully adopts that method, the master is, nevertheless, liable for injuries thereby caused to third persons, if the servant did the forbidden thing as a real means for the performance of his master's work.<sup>4</sup> So, if the master is bound to guard an animal from doing mischief, and for this purpose employs

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<sup>1</sup> *Weed v. Panama R. Co.*, 17 N. Y. 362. In that case, the conductor of a passenger train willfully kept it standing all night, from motives of his own. And Strong, J., said: "No reasons exist for holding a master liable for injuries from negligence of his servants in his employment which do not equally and with like force preclude him from alleging an intentional default of a servant as an excuse for delay in the performance of a duty the master has undertaken. In the former case, the negligence of the servant is that of the master, and that is the ground of the master's liability; in the latter, the act of the servant is the act of the master, constituting negligence of the master; the motive of the servant making no difference in regard to the legal character of the master's default in doing his duty. The obligation to be performed was that of the master and delay in performance, from intentional violation of duty by an agent, is the negligence of the master." The same rule was followed in *Milwaukee & Miss. R. Co. v. Finney* (10 Wisc. 388), and *Phil. & Reading R. Co. v. Derby* (14 How. [U. S.] 468).

<sup>2</sup> *Blackstock v. N. Y. & Erie R. Co.*, 20 N. Y. 48; *Galena & Chicago R. Co. v. Rae*, 18 Ill. 462.

<sup>3</sup> *Blackstock v. N. Y. & Erie R. Co.*, 20 N. Y. 48. That was a case in which all the engineers on the road struck; and the company was therefore unable to deliver the plaintiff's potatoes in time. The defendant offered to prove that the engineers were entirely in the wrong; and it was obvious that they meant to injure the company, so as to compel submission to their demands. But it was held that all this made no difference.

<sup>4</sup> The plaintiff sued the defendant for damages occasioned by the burning of brushwood on his land, whereby the plaintiff's timber was destroyed. The fire was kindled by the defendant's servants during his absence, and against his orders, but for the purpose of doing his work. Held, that the master was liable for the damage (*Keith v. Keir*, Hay, 8; see the comments on this case, Hay, 30).

a servant, who, by an act of willful disobedience, abandons his post, the master is liable for the consequences of the want of a guard.<sup>1</sup>

§ 69. A master is not liable to a criminal action, at common law, for the acts of his servants, unless actually authorized by him, or unless their acts make the business which he authorizes them to conduct a nuisance;<sup>2</sup> and he is not, therefore, liable to an action for a penalty or forfeiture imposed by law upon the acts of which his servants may be guilty, although done in his service, if done without his authority.<sup>3</sup>

§ 70. The master is, of course, liable for the negligence of one whom his servant employs, by his authority, to aid such servant in the master's business.<sup>4</sup> Such authority need not be express, but may be implied from the nature of the business, or the course of trade. Thus, such an authority would almost necessarily be implied in favor of a servant intrusted with the whole care of a farm, or the

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<sup>1</sup> *Whatman v. Pearson*, Law Rep. 3 C. P. 422.

<sup>2</sup> *Regina v. Stephens*, Law Rep. 1 Q. B. 702.

<sup>3</sup> Where an agent was directed by his principal, an overseer of the poor, to assist some paupers toward their destination, but left them, contrary to his instructions and in violation of a statute, so that they became, in consequence, a charge upon a certain parish,—held, that the overseer was not liable to the penalty (*Deerfield v. Delano*, 1 Pick. 465). Parker, C. J., said: "Masters are not answerable *criminaliter*, whatever they may be *civiliter*, for the unauthorized acts of their servants" (Ib.) A statute required that vehicles meeting each other upon the road should seasonably turn to the right of the middle of the road, and that any person driving a vehicle, who should fail to comply with the statute, should pay damages and suffer a penalty. The defendant's vehicle meeting the plaintiff's, the defendant's servant did not turn to the right, and the two vehicles came into collision. Held, that in the absence of evidence of negligence on the part of the servant, the defendant was not liable for either damages or penalty (*Goodhue v. Dix*, 2 Gray, 181).

<sup>4</sup> A corn factor's sister, managing his shop in his absence, employed a drunken man to deliver some corn to a customer. The man took it out on a small truck, contrary to the usual practice, and, by his negligence in leaving it out, a person driving by was injured. The corn factor was held liable to this person, on the ground that the employing of a tipsy person was an act of negligence, and that by such employment he set the whole thing in motion (*Wanstall v. Pooley*, 6 Clark & Fin. 910, n.)

construction of a building, or the transportation of a large quantity of goods, or any other task which could not be performed within a reasonable time by one man. But a question of some difficulty may arise, where a servant, without having any real or ostensible authority to do so, employs an assistant, by whose negligence, in the performance of work assigned to the former servant, a third person is injured. The master would not be bound by a contract made in his name by such a sub-agent, even though it were exactly such as he had authorized his own servant to make; and from this it might not unreasonably be inferred that he could not be made liable for the torts of one whose contracts would not bind him. On the other hand, there is a manifest inconvenience certain to ensue to the public at large from thus shifting the responsibility from masters, who, as a class, are able to meet it, and who receive the benefit of the service, upon servants, who, as a class, are entirely unable to compensate for the injuries thus caused. Public policy, therefore, requires that masters should be held liable for the consequences in such cases; and so the courts have held them, although without laying down any general rule upon the subject.<sup>1</sup>

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<sup>1</sup> If a servant employs another person to assist in the master's business, and the person so employed is guilty of negligence therein, the master is liable (per Willard, J., *Suydam v. Moore*, 8 Barb. 358). Defendant owned a farm, his servant residing on it. In the course of farming, the servant cut a lot of brush, and piled it in heaps adjacent to plaintiff's land. He then sent his son to set fire to it, and the fire extended to plaintiff's land, destroying a quantity of timber thereon. Held, that the act of the son was the act of his father, the defendant's servant, he being under his control, and that defendant was liable (*Simons v. Monier*, 29 Barb. 419). Defendant directed his servant to clear the snow off the roof of his house, without instructing him how to do it. The servant employed another man to assist him, and through the negligence of the assistant, a mass of snow was thrown into the street by which the plaintiff's intestate was killed. The defendant was held to be liable to the administrator. Denio, J., said: "The defendant had the control of his own house and premises, and was bound to see that his necessary affairs, to be carried on in and about them, were so conducted that other persons should not receive injury. In laying this down as a general rule, I concede that it is subject to some exceptions: for instance, if a stranger, without his consent or knowledge, and notwithstanding all usual and proper precau-

§ 71. When the plaintiff has suffered injury from the negligent management of a vehicle, such as a boat, car, or carriage, it is sufficient *prima facie* evidence that the negligence was imputable to the defendant, to show that he was the owner of the thing, without proving affirmatively that the person in charge was the defendant's servant. It lies with the defendant to show that the person in charge was not his servant,<sup>1</sup> leaving him to show, if he can, that the property was not under his control at the time, and that the accident was occasioned by the fault of a stranger, an independent contractor, or other person, for whose negligence the owner would not be answerable. This view is supported by some recent decisions, in which it was held sufficient evidence of the defendant's negligence to show that the plaintiff was injured by something falling out of the window of the defendant's house,<sup>2</sup> or from hoisting apparatus belonging to the defendant.<sup>3</sup>

§ 72. It would seem to be reasonable that the same doctrine should apply to every species of property, which,

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tions, should impertinently interfere in the management of his affairs; and so, also, according to several cases, if he had contracted with another to have work done upon his premises, and an injury had been done to a third person by the servants of such contractor" (Althorf v. Wolfe, 22 N. Y. 355). Where defendant's cart was driven by a person, not in his employ, but to whom his servant had entrusted the reins, and plaintiff's cabriolet was injured by the cart being driven against it, the defendant was held liable, although the driver of the cart was not in his service (Booth v. Mister, 7 Carr. & P. 66).

<sup>1</sup> Thus, in an action for damage done to the plaintiff's long-boat by the negligence of the defendant's servant in steering the defendant's barge, it was proved that the barge was the defendant's, but the plaintiff's witness could not identify the bargeman who was steering the barge. It was held, that this was *prima facie* evidence that the barge was steered by the defendant's servant, and that if the barge was on hire, or in the use of any other person, it lay on the defendant to show those facts (Joyce v. Campbell, 8 Carr. & P. 370). In Norris v. Kohler (41 N. Y.), it was held that proof of the defendant's ownership of a wagon was sufficient, as *prima facie* evidence, to charge him with responsibility for its management.

<sup>2</sup> Byrne v. Boadle, 2 Hurlst. & C. 721.

<sup>3</sup> Scott v. London Dock Co., 3 Hurlst. & C. 596.

in the ordinary course of affairs, is managed by its owner or his servants, and that the mere fact of its mismanagement should raise a presumption that the owner was responsible therefor. We feel, however, some hesitation in saying that this is established as a general rule, although we have no doubt that it should be. It may be that in some of the cases relating to contractors' negligence the plaintiff has been required to prove affirmatively that the person in fault was a servant of the defendant, even after he had proved that the injury was caused by defects in the management of property of the defendant coming within the above description. Of course, the circumstances of the case may be such as to raise a presumption that the property was not, at the time of the accident, under the defendant's actual control; and in such case the usual presumption of the defendant's negligence, arising out of his supposed custody of the thing, is rebutted, and further evidence must be adduced.<sup>1</sup> Thus, in the case of a street, even though the fee is owned by a municipal corporation, the presumption is decidedly that the corporation is not literally in possession when an injury is suffered from the want of repair or from an obstruction; and it is therefore incumbent upon the plaintiff in such case to bring the fault home to the corporation. And it has been well suggested, that where it is the usual course of business to employ a contractor to do certain work on property, no presumption should arise, from the mere fact that such work was going on, that it was done by servants of the owner.<sup>2</sup>

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<sup>1</sup> The plaintiff was injured in consequence of being knocked down by a van belonging to the defendants, and which was lent by them to A., who attached his own horses to the van, and provided a driver. Held, that as the horse was the property, and the driver, strictly speaking, the servant, not of the defendants, but of A., the defendants were not liable (*Shields v. Edinburgh &c. R. Co.*, Hay, 254; 18 D. 1199).

<sup>2</sup> *Welfare v. London & Brighton R. Co.*, Law Rep. 4 Q. B. 693.



§ 73. He is to be deemed the master who has the supreme choice,<sup>1</sup> control,<sup>2</sup> and direction of the servant, and whose will the servant represents, not merely in the ultimate result of his work, but in all its details.<sup>3</sup> The payment of an employee by the day, or the control and supervision of the work by the employer, though important considerations, are not in themselves decisive of the fact that the two are master and servant.<sup>4</sup> It has been well said by a Connecticut judge, that "to get at the truth, we must look further, and see if the person said to be a servant is acting at the time for and in the place of his master, in accordance with and representing his master's will, and not his own."<sup>5</sup> Servants who are employed and paid by one person may nevertheless be, *ad hoc*, the servants of another in a particular transaction, and that, too, even where their general employer is interested in the work. Obviously they may desert the service of their lawful master, and work for another; or he may lend their services

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<sup>1</sup> *National Steam Navigation Co. v. British & C. S. Nav. Co.*, Law Rep. 3 Exch. 330; Story on Agency, § 456.

<sup>2</sup> *McGuire v. Grant*, 1 Dutch. 356.

<sup>3</sup> See *post*, § 76, 77; *Williamson v. Wadsworth*, 49 Barb. 294.

<sup>4</sup> *Corbin v. American Mills*, 27 Conn. 274.

<sup>5</sup> *Corbin v. American Mills*, 27 Conn. 274, per Ellsworth, J. In that case, it appeared that the plaintiff had contracted with a town to remove certain stone, taking the stone in part payment, and afterwards contracted with the defendant to build a dam with the stone, for which he was to receive a certain price per day for himself and each of his men, the defendant furnishing the powder for blasting, and superintending the building of the dam, but having no control over the blasting. Held, that the relation of master and servant did not exist between the parties, and consequently that the defendant was not liable to indemnify the plaintiff for the damages recovered from him by a third party injured by the negligence of men employed upon the blasting. In another case, A. sold to B. a box which was in the loft of A.'s store, and B. sent his porter to take it away, and the porter, while, with the knowledge and permission of A., getting the box down, suffered the box to fall on the plaintiff. Held, that in letting down the box the porter acted as the servant of B., and not of A., and the latter was not liable (*Stevens v. Squires*, 6 N. Y. 435). Where a carrier of goods employed a tow-boat to tow his vessel, and those in charge of the tow-boat were guilty of negligence, whereby damage was done to the goods, and the carrier had not excepted in his contract such risks,—held, that he was liable to the owners of the goods for such negligence (*Merrick v. Brainard*, 38 Barb. 574).

to another person, abandoning to the latter all control over them;<sup>1</sup> or they may, without consulting their master, but in good faith, assist a person independently employed to do something which will benefit their master, but with which neither he nor they have any right to interfere, and in which they act entirely under the control of such other person.<sup>2</sup> In none of these cases is the nominal master responsible to strangers for their acts or omissions.

§ 74. A master who hires out one of his servants to work for another person, is liable to *the hirer* for such servant's negligence in the work, and this even though the particular servant was selected by the hirer himself;<sup>3</sup> and unless the master abandons the entire control of his serv-

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<sup>1</sup> Where goods were being shipped by the defendant on board of a vessel, and while aiding in the shipment, at the defendant's request, the plaintiff, a servant of the defendant, was injured by a defect in the machinery employed for that purpose,—held, that if it was defendant's duty, alone or jointly with the shipmaster, to put the goods on board, he was liable to his servant, but if he had no charge of or control over the operation of shipping, and acted merely as assistant to the shipmaster, then the action would not lie against him (*McGatrick v. Wason*, 4 Ohio St. 566).

<sup>2</sup> The defendant's servants piled in an improper manner some bales of his cotton, under the direction of the warehouseman with whom they were stored, and who had exclusive control over the mode in which they should be piled. The bales fell and injured the plaintiff. Held, that the defendant was not liable, as his servants, in doing this act, were the servants of the warehouseman only (*Murphy v. Caralli*, 3 Hurlst. & C. 462). The plaintiff having to work out a highway tax, hired A. to do the work for him, under the direction of the defendant, the highway surveyor, who by law had exclusive control of the work. A. cut trees adjoining the plaintiff's land so that they fell upon it. The defendant saw the act, and gave no direction to have the trees removed. Held, that A. was acting as the servant of the defendant, and not of the plaintiff, and that the defendant was liable for the injury in trespass (*Elder v. Bemis*, 2 Metc. 599).

<sup>3</sup> The defendant's servant hired himself, on his own account, to the plaintiff to do some thatching. The servant having left his work, the defendant told the plaintiff that if the servant did the work, he, the defendant, must be paid for it. Afterward the servant resumed work, and the defendant sent another to assist him, and received pay for both. An injury having occurred by reason of the thatching being defective, it was held that the defendant was responsible (*Holmes v. Onion*, 2 C. B. [N. S.] 790). Cockburn, C. J., said: "Although true it is that where a man employing a tradesman selects a particular servant or workman to do the job, the master may be relieved from responsibility for the consequences of the man's incompetency, it is, I think, going too far to say that he is relieved from all responsibility if the servant is guilty of negligence" (*Ib.*)

ants to the hirer, he remains liable to strangers for their negligence.<sup>1</sup> The hirer cannot properly be said to have control of the servants, unless he has the right to discharge them and employ others in their places in case of their misconduct or incapacity, that being the only practicable means by which free servants can be controlled. If, therefore, the hirer has no such power, he is not responsible to any one for the faults of the servants. If both he and the person from whom he hires the servants have such control, it seems to us that a person injured by the negligence of such servants in his employment would have the right to recover from either principal at his option, since either could have removed the servant in fault, and such servant represents both the hirer and his regular employer. Perhaps an action would lie against both jointly; but of this we cannot speak with certainty. If the hirer is vested for the time with the *exclusive* right to discharge the servants and to employ others, he alone is responsible for their defaults.

§ 75. Trustees are personally liable to third persons for the negligence of persons employed in the discharge of the trust, unless they are themselves acting as mere agents, with a tangible principal behind them. Thus,

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<sup>1</sup> The defendants hired to H. for a day a steamer and crew. The crew were hired and paid and entirely controlled by the defendants, who also had power to substitute others in their place. By the negligence of the crew an injury was occasioned to the plaintiff. Held, that the defendants were liable, as the crew were their servants, and not those of H. (*Dalyell v. Tyrer*, El. B. & El. 899). The defendant lent another person, for a particular use, his horses and wagon, in charge of the defendant's teamster. Held, that the teamster remained the servant of the defendant, and that the defendant was therefore liable for an injury caused by the negligent management of the team (*Crockett v. Calvert*, 8 Ind. 127). Here it may be observed that the case was substantially the same as if the defendant had undertaken to carry the goods of another person for hire, when, although the wagon might be exclusively occupied for the use of the hirer, it would remain entirely under the control of the defendant, and he would unquestionably be liable for its negligent management. The fact that, in the case cited, the defendant received no compensation for the use of his wagon, made no difference in his liability to third persons.

while the directors of a railroad company are not in general personally liable for the negligence of its servants, trustees of bondholders, who take possession of a railroad under the provisions of a mortgage, and run it for the benefit of the bondholders, cannot require persons injured by the negligence of servants on the road to sue the bondholders, but must personally answer for the damage.<sup>1</sup>

§ 76. Although, in a general sense, every person who enters into a contract may be called a "contractor," yet that word, for want of a better one, has come to be used with special reference to a person who, in the pursuit of an independent business, undertakes to do specific jobs of work for other persons, without submitting himself to their control in respect to all the petty details of the work. It is not altogether easy to give an accurate definition of the word "contractor," as it is used in the reports, and as we shall use it hereafter; but we think we have approximated to accuracy. The true test, as it seems to us, by which to determine whether one who renders service to another does so as a contractor or not, is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the *result* of his work, and not as to the means by which it is accomplished. If he never serves more than one person, there is a very strong presumption that he has no independent occupation; but this presumption is not conclusive. A single large railroad company, for example, might find work enough for a contractor to occupy his whole lifetime, and yet leave him to work in perfect independence, accepting the results of his labor, without ever interfering with his choice of the mode and instruments of working. On the other hand, one may have

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<sup>1</sup> Ballou v. Farnum, 9 Allen, 47.

many employers within a short space of time, yet be a mere servant to each of them in turn.

§ 77. One who has an independent business, and generally serves only in the capacity of a contractor, may abandon that character for a time, and become a mere servant or agent, and this, too, without doing work of a different nature from that to which he is accustomed. If he submits himself to the direction of his employer as to the details of the work, fulfilling his wishes not merely as to the result, but also as to all the means by which that result is to be attained, the contractor becomes a servant in respect of that work.<sup>1</sup> And he may even be a contractor as to part of his service, and a servant as to part. Whether he works as a contractor or as servant, is a question of mingled law and fact,<sup>2</sup> which it is scarcely possible to decide by any fixed rule, which will accurately govern those cases where the one occupation borders closely upon the other. In most instances, the distinction is easily observed. Thus, one who contracts to do a specific piece of work, furnishing his own assistants, and executing the work either entirely according to his own ideas, or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor, and not a servant.<sup>3</sup> The fact that such an employee is paid by the day,<sup>3</sup> or that in all

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<sup>1</sup> See *Brackett v. Lubke*, 4 Allen, 138. So, where the defendant, intending to employ J. M. to haul lumber under a special contract, asked him to borrow a pair of horses from the plaintiff in the defendant's name, and J. M., having done so, negligently injured one of the horses, the defendant was held liable (*Moir v. Hopkins*, 16 Ill. 313).

<sup>2</sup> *Pack v. Mayor &c. of New York*, 8 N. Y. 222; *Kelly v. Mayor &c. of New York*, 11 N. Y. 432; reversing S. C., 4 E. D. Smith, 291; *Forsyth v. Hooper*, 11 Allen, 419; *Allen v. Hayward*, 7 Q. B. 960; *Painter v. Pittsburg*, 46 Penn. St. 213; *Allen v. Willard*, 57 Id. 374.

<sup>3</sup> *Corbin v. American Mills*, 27 Conn. 274.

the work he consults and defers to the wishes of his employer, makes no difference ; although an express contract to pay by the job is always strong evidence that the relation of master and servant does not exist.<sup>1</sup> On the other hand, one who is at all times subject to the will of his employer, and cannot properly refuse to obey his directions as to the mode in which the work shall be done, and as to the persons to be employed upon it, is not a contractor, but a servant, and this, although the employer should never exercise such control, and the employee should be paid by the job, instead of by the day.<sup>2</sup>

§ 78. Where, however, the employer reserves a right to inspect the work during its progress, and to have it done to his satisfaction in all its stages, but without interfering in the choice of workmen, a more difficult question is presented, and one as to which the authorities may not be entirely in accord. Thus, in New York, it has been held that a clause in a contract, requiring the contractor to conform to such further directions, of a specified nature, as might be given by the employer,<sup>3</sup> or requiring him to do the work "under the direction and to the satisfaction" of

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<sup>1</sup> See *Forsyth v. Hooper*, 11 Allen, 419.

<sup>2</sup> *Sadler v. Henlock*, 4 El. & B. 570. The facts in that case were as follows: The defendant employed P. to clean out a drain which was on defendant's land. P. was not in defendant's service, but was a common laborer, selected by defendant on account of his having dug the drain originally. P. cleaned out the drain without assistance from any other person, and without the further direction or inspection of defendant. He received five shillings for the job, from the defendant. In the course of cleaning out the drain, P. took up part of an adjoining highway, and replaced the same in an improper manner and with insufficient materials, in consequence of which plaintiff's horse, passing along the highway, was injured. Held, that under these circumstances P. was not an independent contractor, but was acting as the servant, and under the control of defendant, and, consequently, that defendant was responsible to plaintiff for the injury. So, where the lessees of a building employed a carpenter to repair an awning, which extended from the building over a public way, and made no special contract with the carpenter, it was held that they were liable to a third person, injured, while lawfully using the way, through the negligence of the carpenter (*Brackett v. Lubke*, 4 Allen, 138).

<sup>3</sup> *Pack v. Mayor &c. of New York*, 8 N. Y. 222.

a servant of the employer,<sup>1</sup> did not make the contractor a servant of the employer. In Ohio, under a similar contract, which, however, not only bound the contractor to do the work "under the direction" of the employer's agent, but also provided that such agent should "have entire control over the manner of doing and shaping all, or any part of the same, and whose directions must be strictly obeyed," it was held that the contractor was a mere servant of his employer.<sup>2</sup> The two decisions are not irreconcilable, inasmuch as the control reserved by the employer in the Ohio case, was much broader than in the New York case. It is usually considered inconsistent with the legal character of a contractor, that he should be subject to dismissal by his employer at any moment;<sup>3</sup> but we think that this is

<sup>1</sup> *Kelly v. Mayor &c. of New York*, 11 N. Y. 432. Selden, J., there said: "The object of the clause relied upon was not to give to the commissioner of repairs, and the other officer named, the right to interfere with the workmen, and direct them in detail *how* they should proceed, but to enable them to see that every portion of the work was satisfactorily completed. It authorized them to prescribe *what* was to be done, but not *how* it was to be done, nor *who* should do it." The same decision has been made in Pennsylvania (*Allen v. Willard*, 57 Penn. St. 374; *Hunt v. Pennsylvania R. Co.*, 51 Id. 475). See to the contrary, *Schwartz v. Gilmore*, 45 Ill. 455.

<sup>2</sup> *Cincinnati v. Stone*, 5 Ohio St. 38. It was further held in this case, that the act of the contractor created a nuisance, which the city was bound by its charter to abate, and that the action could be maintained on this ground, independently of that stated in the text. Bartley, J., there said: "Where the employer retains control over the mode and manner of doing the work, and an injury results from the negligence or misconduct of the contractor, or his servant or agent, the employer is placed under a liability equal and similar to that which exists in the ordinary case of principal and agent." Where the servants of N., while grading a street for a city under a contract stipulating that the city officers were to retain direction of the work, made and left an excavation in a public street over night without guards or lights, whereby the plaintiff was injured,—held that the city was responsible, whether the injury arose from the execution of the work ordered, or was the result of the negligent mode of execution (*St. Paul v. Seitz*, 3 Minn. 297).

<sup>3</sup> The defendant hired one Neave to construct a sewer, paying him by the yard, and giving him general superintendence, but reserving to himself the right to dismiss him if he did not do the work satisfactorily. Through Neave's negligence in leaving the sewer without guards or lights, the plaintiff fell into it and was injured. The defendant had himself taken the work upon a contract, in which it was stipulated that he should not underlet any part of it. Held, that Neave was under the defendant's immediate control, and, therefore, that the defendant was liable (*Blake v. Thirst*, 2 Hurlst. & C. 20). The defendant, owning a warehouse in which the plaintiff

only a circumstance to be taken into account, raising a presumption that the person doing the work is subject in all respects to the will of his employer, but not conclusive, where other circumstances exist, inconsistent with that idea.

§ 79. It appearing, from the definition which we have given of a contractor, that he is not the agent or servant of his employer in relation to any thing but the specific results which he undertakes to produce, it follows that his employer is not responsible to third persons for his negligence, or for the negligence of his servants, agents, or subcontractors, in the execution of the work.<sup>1</sup> To use the

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iff's goods were stored, hired a person by the day to superintend its roofing. The superintendent used fire upon the roof so negligently, or unskillfully, that the warehouse took fire and was burned, together with the plaintiff's goods. Held, that the employer was responsible (*Morgan v. Bowman*, 22 Mo. 538). Leonard, J., there said: "The word 'servant' ordinarily indicates a person hired for wages to work as the employer may direct. \* \* \* Greer was not employed as a job man to put the roof upon the house. He was bound to receive his orders in respect to the work from the defendant, and to obey them, and was subject to be dismissed at any moment for misconduct."

<sup>1</sup> The liability of a master for the acts of his servants is precisely commensurate with the extent of his right to control them (*Callahan v. Burlington &c. R. Co.*, 23 Iowa, 562). "When the thing contracted for cannot, of itself, be dangerous or injurious to others, unless it becomes so by reason of the negligent or unskillful manner in which the work is done; and while it is being done, an injury results from such negligence or unskillfulness, only the person chargeable with the negligence or unskillfulness, and their principals, are liable" (per *Bosworth, C. J.*, *O'Rourke v. Hart*, 7 Bosw. 511, 514. To the same effect, see *Chicago v. Robbins*, 2 Black, 418; *Allen v. Willard*, 57 Penn. St. 374; *Painter v. Pittsburg*, 46 Id. 213; *Hilliard v. Richardson*, 3 Gray, 349; *Barry v. St. Louis*, 17 Mo. 121; *Allen v. Hayward*, 7 Q. B. 960). Upon this principle, the defendants in all the following cases were held not liable for the injuries suffered by the plaintiffs. Defendants, having received permission from the street commissioner of New York to build a sewer under the street at their own expense, contracted with A. to construct it. Through the negligence of A.'s workmen in leaving the excavation open and unguarded at night, plaintiff's horses and wagon fell into it (*Blake v. Ferris*, 5 N. Y. 48). The plaintiff and defendant were owners of adjoining ancient houses, and an architect employed by the defendant, to superintend the repairs of his house, having considered it necessary to pull down and rebuild the front wall, agreed with a contractor to do the work at an estimated price; and the workmen of the contractor, in pulling down the wall, removed a breast-summer, which was inserted in the party wall between the defendant's and plaintiff's houses, without taking any precautions by shoring or otherwise, in consequence of



language of Baron Rolfe :<sup>1</sup> "The party employing has the selection of the agent employed ; and it is reasonable that

which the front wall of plaintiff's house fell (*Butler v. Hunter*, 7 Hurlst. & N. 826). The defendant, a butcher, purchasing a beast, employed (as the city ordinance required) a licensed drover to drive it through London ; and the drover having employed a boy to drive it, the boy's negligence in driving caused the beast to run into the plaintiff's premises and injure his property (*Milligan v. Wedge*, 12 Ad. & El. 737). The defendant employed B. to cut all the logs on the defendant's land, and deliver them to him at a certain place, at a certain price per foot, the defendant having nothing to do with them until they arrived at the place of delivery. The plaintiff was injured by B.'s negligence in transporting the logs (*Moore v. Sanborne*, 2 Mich. 519). The defendants contracted with B. to cut across a certain road, but directed that only half of the road should be cut through at once. B., in cutting entirely through the road, thereby tapped a culvert, by which the plaintiff's growing crop was injured (*Steele v. Southeastern R. Co.*, 16 C. B. 550). The defendants, having given a "job" to a certain person to do work upon their railroad, his servants, while at work upon the road, negligently left the plaintiff's bars down, whereby an injury occurred to him (*Clark v. Vermont &c. R. Co.*, 28 Verm. 103). The defendant contracted with certain persons to build its road under the general superintendence of its president, and the contractors, without the knowledge or sanction of the president, committed a trespass (*Wesson v. Seaboard & Roanoke R. Co.*, 4 Jones [N. C.] Law, 379). The defendants contracted with A. to draw their cars through the city of New York, and, through the negligence of A.'s servants, plaintiff's horse and wagon were injured (*Schular v. Hudson River R. Co.*, 38 Barb. 653). A brig, towed by a steamboat, came in collision with a schooner, through the negligence of the master and crew of the steamboat over whom the defendant, the owner of the brig, had no control (*Sproul v. Hemmingway*, 14 Pick. 1). Where zinc manufacturers contracted with a builder for the roofing of a building, and they employed a zinc worker to do the work at so much a yard, he employing men to do it and paying them wages,—held, that the manufacturers were not liable for a death caused by negligence of one of the workmen (*Normile v. Braby*, 4 Fost. & F. 962). A publicly licensed drayman was employed by the defendant to cart a quantity of salt at so much per barrel ; and, while he was so employed, one of the barrels, through the negligence of the drayman, injured a third person. Held, that the defendant was not liable for the injury ; Copeland, J., saying : "Where the person employed is in the exercise of an independent and distinct employment, and not under the immediate control, direction, or supervision of the employer, the latter is not responsible for the negligence or misdoings of the former" (*De Forrest v. Wright*, 2 Mich. 368). The defendants hired one J., who made a business of such work, to haul timber into their yard. J., having his horses hitched to a piece of timber, the defendants' foreman said, "Go on ;" and, J. starting the horses, the immediate result was to swing the timber around so that it struck and injured the plaintiff. The jury finding that the timber was being hauled by J. under a special contract, and that the defendants' foreman had not been negligent, it was held that the defendants were not responsible (*Dalton v. Bachelor*, 1 Fost. & Finl. 15).

<sup>1</sup> *Reedie v. London & Northwestern R. Co.*, 4 Exch. 244 (cited with approval in *Pack v. Mayor &c. of New York*, 8 N. Y. 222, 225 ; *Kelly v. Mayor &c. of New York*, 11 N. Y. 432 ; *Blake v. Ferris*, 5 N. Y. 48).

he who has made choice of an unskillful or careless person to execute his orders, should be responsible for any injury resulting from his want of skill or want of care. But neither the principle of the rule nor the rule itself can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned ;” though the employer is liable for such consequences as naturally flow from the execution of the work in a careful manner.<sup>1</sup> The principle here stated is now perfectly well settled, both in England and America ; but this conclusion has been reached through a series of contradictory decisions, some of which have not been overruled by name, and may therefore mislead the student.<sup>2</sup> The chief diffi-

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<sup>1</sup> *Chicago v. Robbins*, 2 Black, 418 ; see *O'Rourke v. Hart*, 7 Bosw. 511 ; *Carman v. Steubenville &c. R. Co.*, 4 Ohio St. 399.

<sup>2</sup> The first of these decisions was in *Bush v. Steinman* (1 Bos. & P. 404). It was there held that the owner of land, who had contracted for the erection of a house thereon, was liable for an injury caused by the negligence of a sub-contractor, in leaving a heap of lime on the highway. This decision was approved by *Ellenborough, C. J.*, who held a landowner responsible for the negligence of a person with whom he had contracted to build a sewer (*Sly v. Edgley*, 6 Esp. 6). In *Laugher v. Pointer* (5 Barn. & Cr. 547), the court of King's Bench was equally divided upon the question, whether the owner of a carriage was liable for the negligence of a driver furnished by the keeper of a livery stable, from whom he hired the horses for a day, such driver receiving no wages from the stable-keeper, but only a gratuity from the carriage owner. The two judges who held that the owner was not liable, distinguished the case from *Bush v. Steinman*, by confining that case to real property. In *McLaughlin v. Pryor* (4 Man. & G. 48), the circumstances were similar, except that there was some evidence of the defendant's having incited the driver to commit the injury ; and a verdict against him was therefore sustained. In *Quarman v. Burnett* (6 Mees. & W. 499), the same question was presented, substantially, as arose in *Laugher v. Pointer*, and the Court of Exchequer unanimously held that the owner of the carriage was not liable ; laying great stress upon the distinction between real and personal property. In an earlier case, it appeared that defendants employed A., a master porter, to carry away some barrels of flour from their warehouse. A. used his own tackle, and employed and paid his own men. While his men were at work, the plaintiff was injured by the falling of a barrel of flour on him, in consequence of the tackle failing. Held, that the defendants were liable, *Littledale, J.*, remarking : “ It seems to me to make no difference whether the persons whose negligence occasions the injury be servants of the defendant, paid by daily wages, or be brought to the warehouse by a person employed by the defendant.” “ The law is the same in each case ” (*Randleson v. Murray*, 8 Ad. & El. 109). The defendants' counsel, in that

culty has arisen from an attempt to distinguish between the services of contractors in respect of real and of personal property, to which we shall presently allude:<sup>1</sup> an attempt no longer made by any court.

§ 80. The same principle is applicable to the case of sub-contractors; and a contractor who employs another contractor to execute the whole or a part of his job, leaving to the latter that freedom in the choice of means which we have heretofore described as part of the attributes of a contractor, is not liable to strangers for the negligence of the sub-contractor.<sup>2</sup> And the rule is ap-

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case, did not undertake to controvert the decision in *Bush v. Steinman*. And Denman, C. J., remarked, that the jury would no doubt have found that the under porters were servants of the defendants, had the question been left to them. This case was mentioned in *Quarman v. Burnett*, and *Rapson v. Cubitt*, as one which might perhaps be sustained as applicable to real property only. Later decisions have, however, entirely overruled this distinction, and declared that *Bush v. Steinman* is not law. See *post*, § 82. *Randleson v. Murray* unquestionably falls with it.

In this country, the doctrine of *Bush v. Steinman* was approved and applied in *Lowell v. Boston & Lowell R. Co.*, 23 Pick. 24; *Stone v. Cheshire R. Co.*, 19 N. H. 427; *Wiswall v. Brinson*, 10 Ired. [N. C.] Law, 554 (Ruffin, C. J., dissenting); and *Mayor &c. of New York v. Bailey*, 2 Denio, 433 (per Walworth, Ch., and Hand, Senator). But it has since been wholly repudiated in New York (*Blake v. Ferris*, 5 N. Y. 48; *Pack v. Mayor &c. of New York*, 8 N. Y. 222; and other cases), in Massachusetts (*Hilliard v. Richardson*, 3 Gray, 349), in Pennsylvania (*Painter v. Pittsburgh*, 46 Penn. St. 213; *Allen v. Willard*, 57 Id. 374), and most of the other states.

<sup>1</sup> See § 82.

<sup>2</sup> The defendant, a builder, was employed by the committee of a club to execute certain alterations at the club-house, including the preparation and fixing of gas-fittings. He made a sub-contract with B., a gas-fitter, to execute this part of the work. In the course of doing it, through B.'s negligence, the gas exploded and injured the plaintiff. Held, that the defendant was not liable for this injury (*Rapson v. Cubitt*, 9 Mees. & W. 710). A railway company made a contract with A. to build a part of their line. A. made a sub-contract with B. to erect a bridge on it, and B. made a sub-contract with C. to supply the scaffolding, B. supplying the necessary materials and lights also. In consequence of the want of a sufficient light on the work, plaintiff was injured. Held, in an action against B., that he was not liable, and that plaintiff's remedy was against C. (*Knight v. Fox*, 5 Exch. 721). The defendant, an undertaker, took charge of a funeral, and employed several carriages in it; one of which, owned by the driver, was so negligently managed as to injure the plaintiff. Held, that the defendant was not liable (*Boniface v. Relyea*, 5 Abb. [N. S.] 259; 36 How. Pr. 457). A. contracted with B. to make alterations in a house owned by him. B. entered into several sub-contracts, and, among them, into one with C., to do the plaster-work. The

applicable to the case of a contractor who is entrusted with only part of an entire job, as much as if he had charge of the whole. Thus, if the owner of land makes separate contracts with a stone-mason, a bricklayer, a carpenter, and a plumber, each to do the work of his own trade upon a single house, each of these mechanics is a contractor, within the meaning of the rule already stated, as much as if he had agreed to put up the entire building. Even if a single species of work upon a single piece of property should be divided between two or more contractors, they would not thereby necessarily lose the character of contractors, and, if their employer had no further control over them than he would have over a contractor for the whole work, he would not be liable for their negligence.<sup>1</sup>

§ 81. A contractor, not being himself the agent or servant of his employer, it follows that the servants employed by him upon the work are his servants, and not his

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house was duly fenced in, and lighted at night. C. laid down a lot of lime outside the fence, and D., driving by at night, was upset and killed. Held, in a suit brought by the widow of D. against A., B., and C., that neither A., the owner, nor B., the contractor, was liable for the acts of C., the sub-contractor (*Richmond v. Russell*, Hay, 115; 22 Scotch Jur. 394). So, in *Overton v. Freeman* (11 C. B. 867), where it appeared that A. contracted to pave a district, and B. entered into a sub-contract with him to pave a particular street, A. supplying the stones, and his carts being used to carry them,—it was held, that A. was not liable for injuries caused by the negligence of the servants of B. in leaving a heap of stones in the street, and that the fact of the act complained of amounting to a public nuisance made no difference. But evidence of a sub-contract must be clear, as this claim for exemption is looked upon with some suspicion (see *Allen v. Willard*, 57 Penn. St. 374).

<sup>1</sup> Where the owner of land, being about to erect a building thereon, contracts with a person to furnish and set the marble for the front of the building, and does not interfere or reserve any right of interference with the work, he is not liable for injuries, caused by the negligence of the contractor's servants, to a third person (*Potter v. Seymour*, 4 Bosw. 140). "When we once arrive at the principle that employment, control, and supervision, or the right to such, over the person whose neglect was the immediate cause of the injury, is to test all these cases, the logical result seems inevitable, that such rule is as applicable to contracts for distinct portions of a building as to a contract for the whole" (per Hoffman, J., *Potter v. Seymour*, 4 Bosw. 140, 148).

employer's, and, of course, that the latter is not responsible for their act or default.<sup>1</sup> This is so, even where his employer stipulates for the right to dismiss any of the servants employed upon the work, for the power of dismissal is by no means equivalent to the right of selection.<sup>2</sup> But servants appointed by the principal employer, are *his* servants, even though their wages are paid by the contractor.<sup>3</sup> This is not, however, to be understood as implying that the mere recommendation of a servant to a contractor, by the latter's employer, is enough to make the employer responsible for such servant's acts. In order to have such an effect, the recommendation must be in substance a dictation of the choice; and this must be determined by a consideration of all the circumstances. If the contractor had reason to fear that his disregard of the recommendation would lead to his injury, he may treat it as a positive selection of the servant; but, in other cases, he must use his own discretion, and bear the entire responsibility. Neither does the employer of a contractor assume

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<sup>1</sup> *Reedie v. London & Northwestern R. Co.*, 4 Exch. 244; *Blake v. Ferris*, 5 N. Y. 48; *Hilliard v. Richardson*, 3 Gray, 349; *Allen v. Willard*, 57 Penn. St. 374; *Scammon v. Chicago*, 25 Ill. 424. The same point is involved in nearly all the cases cited under § 79.

<sup>2</sup> Where a railroad company engaged a contractor to make a viaduct in part of its road, and, through the negligence of workmen employed by the contractor, a stone fell on a man under the viaduct and killed him,—held, that the company was not liable to an action by his personal representative, under the 8 & 9 Vict. c. 93, although by the terms of the deed of contract, the company reserved to itself the right of dismissing incompetent workmen, should such be employed by the contractor (*Reedie v. Northwestern R. Co.*, 4 Exch. 244).

<sup>3</sup> Thus, it was said by Parke, B. (in a case which will be presently cited upon another point), where the defendants had hired a driver from the keeper of a livery stable: "If, indeed, the defendants had insisted upon the horses being driven, not by one of the regular servants, but by a stranger to the job-master, appointed by themselves, it would have made all the difference" (*Quarman v. Burnett*, 6 Mees. & W. 499). Where the agreement between the owner and master was, that the former should make contracts for, and receive, the freight, and pay wharfage, and the master should receive a share of the freight money, pay certain expenses, and be allowed to select employees,—held, that this was not such a surrender of control as to relieve the owner from liability arising from negligence in the management of the vessel (*Annett v. Foster*, 1 Daly, 502).

any liability for a servant of the latter, by simply expressing a preference for that servant over others, and thus inducing the contractor to assign him to the work.<sup>1</sup> Where, however, the servants actually employed upon the work receive their wages directly from the person for whose benefit the work is done, the presumption is that they are his servants, although they are selected and superintended by another person hired by the former to render that service.<sup>2</sup>

§ 81 *a*. A pilot, when taken on board a vessel without any legal compulsion, is considered the servant of the owner, who is responsible for the negligence of the pilot to the same extent as for that of any other servant;<sup>3</sup> but if the owner is compelled by law to take a particular pilot, he is not thus responsible.<sup>4</sup> The owner is, however, liable

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<sup>1</sup> Thus, in *Quarman v. Burnett* (6 Mees. & W. 499), it appeared that the defendants hired horses and a driver from a livery-stable keeper, and furnished a suit of livery for the wear of a particular driver, who always drove for them when able to do so. Held, that the driver was not the defendants' servant, and that they were not liable for his negligence while driving their carriage; Parke, B., saying: "It seems to us, that if the defendants had asked for that particular servant, amongst many, and refused to be driven by any other, they would not have been responsible for his acts and neglects. If the driver be the servant of a job-master, we do not think he ceases to be so by reason of the owner of the carriage preferring to be driven by that particular servant, where there is a choice amongst more, any more than a hack post-boy ceases to be the servant of an inn-keeper, where a traveler has a particular preference of one over the rest on account of his sobriety and carefulness."

<sup>2</sup> Where S. engaged C. to do the carpenter-work on a building, superintend all the work, employ all the hands, and certify all their bills, S. paying them, it was held, that C. was merely the agent of S., and that S. was liable to a third person, who fell into a pit which had been negligently left open by the carpenters (*Samyn v. McClosky*, 2 Ohio St. 536).

<sup>3</sup> *Yates v. Brown*, 8 Pick. 23; *Bussy v. Donaldson*, 4 Dallas, 206; *Shaw v. Reed*, 9 Watts & S. 72; *Fletcher v. Braddick*, 5 Bos. & P. 182; *The Stettin, Brow. & Lush*. 199; 31 L. J. [P. & D.] 208; *The Lion*, Law Rep. 2 Adm. 102.

<sup>4</sup> Thus, the owner is exempt if required to employ the first pilot that offers (*National Steam Navigation Co. v. British &c. Navigation Co.*, Law Rep. 3 Exch. 330; *Story on Agency*, § 456*a*; *The Halley*, Law Rep. 2 P. C. 193). Other English decisions go farther, but they are founded on peculiar statutes (see *Lucey v. Ingram*, 6 Mees. & W. 302; *M'Intosh v. Slade*, 6 Barn. & Cr. 657; *Bennet v. Moita*, 7 Taunt. 258; *Ritchie v. Bowsfield*, Id. 309).

for the negligence of the master and crew in all cases, even though a compulsory pilot is on board.<sup>1</sup> And where the owner is at liberty to make a selection among pilots,<sup>2</sup> all qualified for the service, or to dispense with a pilot altogether, subject to the payment of pilotage for service not rendered,<sup>3</sup> he is liable for the pilot's negligence.

§ 82. There is nothing in the nature of real property which requires that its owner should be held to a stricter liability than the owner of personal property; and he is not, therefore, responsible for the negligence of persons employed upon his land, any further than he would be if they were employed about his chattels.<sup>4</sup> Many attempts have been made to establish such a distinction, and to make the owner of land responsible for the misuse of his

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<sup>1</sup> *The Queen*, Law Rep. 2 Adm. 354; *The Protector*, 1 C. Rob. 45; *The Diana*, 1 W. Rob. 131; *Smith v. Condry*, 17 Peters, 20; 1 How. [U. S.] 28.

<sup>2</sup> *Martin v. Temperley*, 4 Q. B. 298.

<sup>3</sup> *Williamson v. Price*, 16 Martin, 399; *Yates v. Brown*, 8 Pick. 23.

<sup>4</sup> *Reedie v. London & Northwestern R. Co.*, 4 Exch. 244; *Gayford v. Nicholls*, 9 Id. 702; *Knight v. Fox*, 5 Id. 721; *Overton v. Freeman*, 11 C. B. 867; *Peachey v. Rowland*, 13 Id. 182; *Blake v. Ferris*, 5 N. Y. 48; *Pack v. Mayor &c. of New York*, 8 Id. 222; *Kelley v. Mayor &c. of New York*, 11 Id. 432; *Gourdier v. Cormack*, 2 E. D. Smith, 254; *Hilliard v. Richardson*, 3 Gray, 349; *Painter v. Pittsburgh*, 46 Penn. St. 213; see *Burgess v. Gray*, 1 C. B. 578. This rule has been applied, and the owner of real property held not to be liable, where he contracted with a third person to repair his house, and, through the negligence of the contractor's servants, plaintiff was injured by a timber falling from the house (*Vanderpool v. Husson*, 28 Barb. 196); where he contracted for the alteration of a building into two dwelling houses, and the plaintiff was injured by lumber which the contractor's servants negligently left in the highway in front of the plaintiff's land (*Hilliard v. Richardson*, 3 Gray, 349); where he contracted for the building of a wall, and it was blown down, causing damage to plaintiff's property (*Benedict v. Martin*, 36 Barb. 238); where he contracted for the removal of certain awning posts from his premises, and, through the negligence of the contractor's servants, an iron railing fell upon plaintiff while passing along the street (*O'Rourke v. Hart*, 7 Bosw. 511); where he contracted for the addition of a leader to his house, and, in consequence of the negligence of the contractor's servant, water flowed into the premises of plaintiff (*Gilbert v. Beach*, 5 Bosw. 445); and where he contracted for the digging of a sewer, which was left unfenced and unguarded, to the plaintiff's injury, and which the court assumed that it was the contractor's duty to guard (*Blake v. Ferris*, 5 N. Y. 48; see *Painter v. Pittsburgh*, 46 Penn. St. 213).

property by contractors and their servants; and for a long time the courts gave it a certain recognition; but, on more thorough consideration, they repudiated it altogether.<sup>1</sup> Even though the injury be caused by the actual contact of the soil with the person or property of the plaintiff, yet if such contact arises from the act of a mere contractor or his servant, the owner of the soil is not liable.<sup>2</sup>

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<sup>1</sup> The history of the decisions and *dicta* upon this point is worth reviewing. The distinction seems to have been first suggested by Eyre, C. J., in *Bush v. Steinman* (1 Bos. & P. 404). The other judges did not put their decision upon that ground. In *Laugher v. Pointer* (1826, 5 Barn. & Cr. 547), the court was equally divided upon the question whether the rule in *Bush v. Steinman* should be applied to the owner of movable property, and the judges who held that it should not relied much upon this distinction as the proper basis for the judgment in the earlier case. In *Quarman v. Burnett* (1840, 6 Mees. & W. 499), the court decided that *Bush v. Steinman* could not be supported on any other ground, but intimated that it might well stand upon this. The same opinion was expressed in *Rapson v. Cubitt* (1842, 9 Mees. & W. 710). In *Milligan v. Wedge* (1840, 12 Ad. & EL 737), the validity of this distinction was doubted; and in *Allen v. Hayward* (1845, 7 Q. B. 960), it was practically denied; but it was not until 1849 that it was finally passed upon. At that time a case was argued in the Exchequer, where it appeared that the defendant contracted with A. to build a portion of its road. In building a bridge over a highway, through the negligence of A.'s workmen, B. was killed while passing underneath the bridge, by a stone falling on him. Held, that his administratrix could not recover against defendant under the statute, the accident being caused by the negligence of the contractor's workmen (*Reedie v. London & Northwestern R. Co.*, 4 Exch. 244). In this case, the authority of *Bush v. Steinman* was strongly pressed, as establishing the doctrine that there was a distinction between the liability of the owner of real estate, and that of the owner of chattels, for their negligent management, by virtue of which the former is liable where the latter might not be. But the court (per Rolfe, B.) said: "On full consideration, we have come to the conclusion that there is no such distinction, unless, perhaps, in cases where the act complained of is such as to amount to a nuisance; and, in fact, that according to the modern decisions, *Bush v. Steinman* must be taken not to be law, or, at all events, that it cannot be supported on the ground on which the judgment of the court proceeded." In *Overton v. Freeman* (1851, 11 C. B. 867), which was decided in the same court which decided *Bush v. Steinman*, that case was expressly overruled, and *Reedie v. Northwestern R. Co.* approved, if not even divested of its qualification in respect to a nuisance. In *Gayford v. Nicholls* (1854, 9 Exch. 702), *Bush v. Steinman* was again cited and overruled; and since that time we cannot find that it has ever been quoted as an authority in England. The American cases in which it has been cited, have been reviewed in a note to § 79. All the recent decisions are opposed to it.

<sup>2</sup> So held, where the contractor for the grading of a public street injured the plaintiff by blasting rock (*Pack v. Mayor &c. of New York*, 8 N. Y. 222; *Kelley v. Mayor &c. of New York*, 11 Id. 432). Defendants contracted with A. to remove certain rocks on his lot. A., being about to blast, sent a written notice to plaintiff



§ 83. Of course, if the injury complained of is the consequence of the neglect of a duty which was incumbent upon the person for whose benefit the work was done, and not upon the contractor, the existence of the contract is no defense to the former. This is obvious, when stated as a general principle; but in the practical application of the general rule exempting owners from liability for contractors' negligence, this consideration is in danger of being overlooked. Thus, in the leading case in the courts of New York upon the general rule, the person employing the contractor was held not liable to third persons for the want of proper guards to a sewer, which the contractor dug in a public street.<sup>1</sup> It was assumed that it was the duty of the contractor to place such guards around the excavation. But in later cases, it has been held that, in the absence of positive stipulations to that effect, the contractor owes no such duty to his employer, whatever he may owe to third persons.<sup>2</sup> The correctness of the actual *decision* in *Blake v. Ferris* has therefore been questioned in the court which made it,<sup>3</sup> and, we think, with justice; while the correctness of the *doctrine* expressed in the opinion of the court in that case has always been acknowledged. And it has been rightly held that where a plaintiff has been damaged by the want of proper precautions against injury to the public from work done by a contractor, the employer could not escape liability, without showing that the contractor had neglected to perform a duty in the premises, which the employer had a right to

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to take care of his property, with defendants' name signed to the notice. Plaintiff's house was injured by the blast. Held, that defendants, having no control over A., further than under the contract, were not liable for his negligence (*Gourdier v. Cormack*, 2 E. D. Smith, 254).

<sup>1</sup> *Blake v. Ferris*, 5 N. Y. 48.

<sup>2</sup> *City of Buffalo v. Holloway*, 7 N. Y. 493.

<sup>3</sup> Per Comstock, J., *Storrs v. Utica*, 17 N. Y. 104.

enforce.<sup>1</sup> So, if the employer undertakes to supply the contractor with any thing necessary to enable the latter to avoid injury to others from the work, the employer, if he fails to supply it, cannot avoid liability for the contractor's neglect to avoid such injury.<sup>2</sup>

§ 84. Where a contractor is employed to do an unlawful act, *e. g.*, to make an excavation in a highway, without authority from the proper public officer,<sup>3</sup> or to create a nuisance,<sup>4</sup> a person injured by such unlawful act, or by any result of it, may recover damages from either the contractor or the employer, or both. This, however, is a rule

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<sup>1</sup> The defendants, who had contracted to build a house, employed a blacksmith, at a stipulated price, to make and finish a grating on the front area, the opening for which grating being left without a cover or fence, the plaintiff fell through it and was injured. Held, that as it did not appear that the blacksmith was bound to guard and protect the opening except while engaged on his own work, the negligence to which the accident was owing was justly imputable to the defendants and their servants (*McCleary v. Kent*, 3 Duer, 27). In another case, A., being employed to plaster a house, caused two openings to be made through the wall of the house from an adjoining staircase. He did not cause them to be closed up when he left his work, but they continued to be used by other parties; and while they still continued open, B., accidentally entering one of them, fell through the floor and sustained injuries. Held, on appeal to the House of Lords, that A. was bound to provide against accidents only while his workmen were on the premises; that this duty, on his leaving the work, devolved on the proprietor, or the workmen next employed; and that the responsibility did not attach to the first opening of the passage, but to the subsequent neglect (*Smith v. Milne*, 2 Dow, 290).

<sup>2</sup> Defendant contracted with certain persons to erect a building on his lot. While the work was going on, the defendant agreed to furnish certain iron pipe necessary for it, and, in consequence of his delay in furnishing it, plaintiff's premises were injured by water flowing into them. Held, that the defendant was liable, notwithstanding another person had contracted with him to furnish the pipe (*Gilbert v. Beach*, 5 Bosw. 445, 455).

<sup>3</sup> Where the plaintiff was injured by a pile of stones left in a public street by some servants, working under a contract made by their master with the defendants, unlawfully to excavate in a public street, the defendants were held liable (*Ellis v. Sheffield Gas Cons. Co.*, 2 Ellis & B. 767). Lord Campbell, C. J., said: "It would be monstrous if the party causing another to do a thing were exempted from liability for that act, merely because there was a contract between him and the person immediately causing the act to be done" (*Ib.*) The same point was decided in *Congreve v. Morgan* (5 Duer, 495), affirmed, *sub nom.* *Congreve v. Smith* (18 N. Y. 79), and in *Creed v. Hartmann* (29 N. Y. 591).

<sup>4</sup> *Cincinnati v. Stone*, 5 Ohio St. 38.

entirely distinct from any question of negligence, although the particular injury recovered for may be the consequence of the negligence of persons employed upon the work. No amount of care would exonerate the parties who authorized the wrongful act. Their liability arises from the fact that they instigated, and received the benefit of, a trespass. The contractor's negligence could only aggravate the injury: it would not be in any sense the foundation of the right to recover. Neither can any one escape from the burden of an obligation imposed upon him by law, by engaging for its performance by a contractor. Whatever he is bound to do, must be done; and though he may have a remedy against his contractor for the failure of the latter to discharge his duty, strangers to the contract are still at liberty to enforce the rights conferred upon them by the law, without noticing the contract.<sup>1</sup> Thus, since a municipal corporation is bound to keep its streets in a safe condition, it is liable for an injury caused by the want of proper guards around an excavation, made in the street by a contractor at its request.<sup>2</sup> So, where persons making drains on their land are required by statute to cover them, or to refill the excavations made in their construction, they are liable for injuries caused by their contractor's neglect to perform this duty as it ought to have been done.<sup>3</sup>

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<sup>1</sup> *Mersey Docks Trustees v. Gibbs*, Law Rep. 1 H. L. 93; *Pickard v. Smith*, 19 C. B. [N. S.] 480. Thus, where a railroad company undertakes to build a bridge, which falls upon a traveler, the fact that it was built by contract affords no defense (*Hole v. Sittingbourne & Co. R. Co.*, 6 Hurlst. & N. 488).

<sup>2</sup> *Storrs v. Utica*, 17 N. Y. 104; *St. Paul v. Seitz*, 3 Minn. 297. Where the injury complained of arises from the nature of the work contracted for, and not from a failure to execute it, it seems that the employer of the contractor must be liable (*Ib.*) See the chapter on MUNICIPAL CORPORATIONS for other illustrations.

<sup>3</sup> The owner of certain land employed a contractor to make a drain therefor, which a statute made it the duty of the owner to refill. The contractor not properly refilling it, the earth in it subsided, so that the plaintiff, in passing, fell into the hole made thereby and was injured. Held, that the defendant could not, by making a contract for the work, avoid his responsibility for having the drain refilled, and therefore that he was liable (*Gray v. Pullen*, 5 Best & S. 970, 981).

§ 85. In deference to the invariable usage of English and American law-writers, we have dealt with this subject under the title of master and servant, as though the principles here stated were inapplicable to any other class of agents than those who are called servants. Such, however, is not our own judgment; and we think that the only way in which it has been found possible to confine this branch of the law to the relation of master and servant has been by gradually extending the meaning of the words until they become synonymous with principal and agent. They do not, however, properly mean the same thing; and we should greatly prefer to see a change in the language of the decisions, rather than that the right sense of words should be thus perverted.

## CHAPTER VI.

### LIABILITY OF MASTERS TO SERVANTS.

- Sec. 86. Master not liable to servant for negligence of fellow-servant.  
87. Master not absolutely liable for defective materials.  
88. The reason of the rule.  
89. Master liable to servant for his own negligence.  
90. Master's liability for negligence in selection of servant.  
91. Evidence of negligence in selection.  
92. Liability for negligence in selecting materials.  
93. Master's liability for negligence in other respects.  
94. Master exonerated by servant's notice of risk.  
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96. Continuance of servant in work not conclusive evidence of waiver.  
97. Knowledge of infant servant.  
98. Servant's knowledge of master's personal negligence.  
99. Burden of proof as to knowledge of defects.  
100. Who are fellow-servants.  
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108. Servants in the same common employment.  
109. What is a common employment.  
110. Who are not in a common employment.

§ 86. A master is not liable to his servant for the negligence of a fellow-servant,<sup>1</sup> while engaged in the same common employment,<sup>2</sup> unless he has been negligent in his

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<sup>1</sup> In *Wilson v. Merry* (Law Rep. 1 S. & D. 326), Lord Cairns objected to the use of the term "fellow-servant," as inadequate to express the rule correctly. But as defined in section 100, the phrase does well enough.

<sup>2</sup> *Hutchinson v. York, Newcastle &c. R. Co.*, 5 Exch. 343; *Wigmore v. Jay*, Id. 354; *Tarrant v. Webb*, 18 C. B. 797; *Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. 266; *Morgan v. Vale of Neath R. Co.*, Law Rep. 1 Q. B. 149; *Searle v. Lindsay*, 11 C. B. [N. S.] 429; *Sherman v. Rochester &c. R. Co.*, 17 N. Y. 153; *Russell v. Hudson River R. Co.*, Id. 134; *Coon v. Syracuse & Utica R. Co.*, 5 N. Y. 492; *Wright v. N. Y. Central R. Co.*, 25 N. Y. 562; *Ryan v. Cumberland Valley R. Co.*, 23 Penn. St.

selection of the servant in fault,<sup>1</sup> or in retaining him after notice of his incompetency.<sup>2</sup> The master does not warrant the competency of any of his servants to the others.<sup>3</sup> Whether rightly or wrongly decided, as a matter of principle, it is at least certain that this rule is the settled law of Great Britain, Ireland, and America.<sup>4</sup> Very grave objections have been made to the doctrine, but their weight must be left for legislatures to determine. It is too late for the courts to reconsider their decisions on the point. The history of the rise and progress of this rule would be interesting, though not sufficiently practical in its bearing

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384; *Farwell v. Boston & Worcester R. Co.*, 4 Metc. 49; *Hard v. Vermont &c. R. Co.*, 32 Verm. 473; *Griffith v. Gidlow*, 3 Hurlst. & N. 648; *Carle v. Bangor &c. R. Co.*, 43 Maine, 269; *Beaulieu v. Portland Co.*, 48 Id. 291; *Burke v. Norwich & Worc. R. Co.*, 34 Conn. 474; *Ponton v. Wilmington &c. R. Co.*, 6 Jones [N. C.] Law, 245; *Mad River &c. R. Co. v. Barber*, 5 Ohio St. 541; *Whaalan v. Mad River &c. R. Co.*, 8 Ohio St. 249; *Columbus &c. R. Co. v. Webb*, 12 Ohio St. 475; *Chicago &c. R. Co. v. Harney*, 28 Ind. 28; *Ohio &c. R. Co. v. Hammersley*, Id. 371; *Ohio &c. R. Co. v. Tindall*, 13 Ind. 366; *Wilson v. Madison &c. R. Co.*, 18 Ind. 226; *Michigan &c. R. Co. v. Leahey*, 10 Mich. 193; *Sullivan v. Mississippi &c. R. Co.*, 11 Iowa, 421; *Fox v. Sanford*, 4 Sneed, 36; *Karl v. Maillard*, 3 Bosw. 591; *Illinois &c. R. Co. v. Cox*, 21 Ill. 20; *Honner v. Illinois Cent. R. Co.*, 15 Ill. 550; *Rohback v. Pacific R. Co.*, 43 Mo. 187; see *Brown v. Maxwell*, 6 Hill, 592. The only decision to the contrary appears to be *Chamberlain v. Milwaukee &c. R. Co.*, 11 Wisc. 238. In *Abraham v. Reynolds* (5 Hurlst. & N. 143), Pollock, C. B., said: "When two persons serve the same master, one cannot sue the master for the negligence of his fellow-servant. The rule applies to every establishment. No member of an establishment can maintain an action against the master for an injury done to him by another member of that establishment, in respect of which, if he had been a stranger, he might have had a right of action. A friend of the servant, a son, a relation, living in the same house, not in the character of a servant, but as a member of the same family, are probably in the same position, and such persons cannot maintain actions any more than a servant could." In Kentucky, a master is held liable to his servant for the gross negligence of a fellow-servant (*Louisville &c. R. Co. v. Robinson*, 4 Bush, 507).

<sup>1</sup> This is conceded in all the foregoing cases. See further, *post*, § 90.

<sup>2</sup> See *Weger v. Pennsylvania R. Co.*, 55 Penn. St. 460.

<sup>3</sup> *Wilson v. Merry*, Law Rep. 1 S. & D. 326.

<sup>4</sup> A statute declaring that railroad companies shall be liable for all damages happening to any person in consequence of any neglect of their agents, or mismanagement of their engineers, does not change the common law rule in regard to the liability of such corporations to their servants for the negligence of a fellow-servant (*Sullivan v. Mississippi & Mo. R. Co.*, 11 Iowa, 421; *Carle v. Bangor &c. Canal & R. Co.*, 43 Maine, 269). But we are informed that under such a statute in Iowa (Stat. 1862, p. 198), a contrary decision has been made.

to warrant us in going into it here. Suffice it to say, that the decisions are founded one upon another, until we reach *Priestly v. Fowler*,<sup>1</sup> which is usually cited as the original authority for the doctrine. Yet that case, it will be found, did not raise the question for decision, and is no authority for the rule.<sup>2</sup>

§ 87. A master is not liable to his servant for any defects in the materials furnished to the latter for use in the master's service, if he was not personally negligent in providing such materials, or in omitting to warn the servant of their defects.<sup>3</sup> There is, in short, no implied warranty in the contract of service that the materials furnished by the master shall be sound or fit for the purpose,<sup>4</sup> nor that the servant shall not be exposed to extraordinary risks;<sup>5</sup> and the law imposes upon the master only an obligation to use ordinary care for this purpose, so far as he personally is concerned, which he is generally pre-

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<sup>1</sup> 3 Mees. & W. 1.

<sup>2</sup> See a review of this doctrine in *Dixon v. Ranken* (14 Dunlop, 480), where the courts of Scotland emphatically repudiated it, although the House of Lords, on a subsequent appeal, declared the law of Scotland to be the same in this respect as that of England (*Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. 206). Mr. Vernon Lushing-ton has also written an excellent paper on the subject.

<sup>3</sup> So it has been adjudged, where it appeared that the defect was occasioned by the incompetency or neglect of a fellow-servant (*Tarrant v. Webb*, 18 C. B. 797; *Wigmore v. Jay*, 5 Exch. 354; *Brown v. Accrington Cotton Co.*, 3 Hurlst. & C. 511); and also where the origin of the defect did not appear (*Warner v. Erie R. Co.*, 39 N. Y. 468; *Ormond v. Holland*, El. B. & E. 102; *Flynn v. Beebe*, 98 Mass. 575; *Columbus and Xenia R. Co. v. Webb*, 12 Ohio St. 475; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Buzzell v. Laconia Mfg. Co.*, 48 Maine, 113; see *Priestly v. Fowler*, 3 Mees. & W. 1).

<sup>4</sup> This is substantially the form in which the doctrine is stated in several adjudged cases (*Ormond v. Holland*, El. Bl. & El. 102; *Hard v. Vermont & Canada R. Co.*, 32 Verm. 473; *Columbus & Xenia R. Co. v. Webb*, 12 Ohio St. 475; *Mad River &c. R. Co. v. Barber*, 5 Id. 541; *Indianapolis &c. R. Co. v. Love*, 10 Ind. 554). Compare *Chicago &c. R. Co. v. Swett*, 45 Ill. 197, in which language apparently inconsistent with this is used, but which must be limited by considering that the case was presented on demurrer.

<sup>5</sup> *Riley v. Baxendale*, 6 Hurlst. & N. 446; see *Seaver v. Boston & Maine R. Co.*, 14 Gray, 466.

sumed to have fulfilled. A railroad company is, therefore, not *prima facie* liable to any of its servants for defects in its rolling stock,<sup>1</sup> rails,<sup>2</sup> or bridges,<sup>3</sup> even where such servant is not employed upon the particular thing which is defective, but upon work wholly unconnected therewith. Thus, where the plaintiff was employed by a railroad company upon work unconnected with the train or the track, and daily passed over its road free of charge, to and from his work, and the train carrying the plaintiff was thrown from the track, in consequence of some rails not being properly joined together, it was held that the defendant was not liable.<sup>4</sup> Where, however, a deduction was made from the wages that would otherwise have been charged, on account of such transportation, it was held that the servant had for the time all the rights of other passengers.<sup>5</sup>

§ 88. The reason usually assigned for the rule is that a servant, in bargaining for his wages, takes into account all the ordinary risks of the business upon which he enters,<sup>6</sup> and obtains a compensation which, upon the average, covers these risks, among which are reckoned the negligence of fellow-servants, and, so far as he is aware of

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<sup>1</sup> *Hard v. Vermont & Canada R. Co.*, 32 Verm. 473; *Mad River &c. R. Co. v. Barber*, 5 Ohio St. 541.

<sup>2</sup> *Indianapolis &c. R. Co. v. Love*, 10 Ind. 554.

<sup>3</sup> *Warner v. Erie R. Co.*, 39 N. Y. 468; reversing S. C., 49 Barb. 558.

<sup>4</sup> *Seaver v. Boston & Maine R. Co.*, 14 Gray, 466; *Moss v. Johnson*, 22 Ill. 633. In the latter case, Breese, J., said: "The defendant in error was his own master, fettered by nothing but considerations of his own interest, and they prompted him to incur the hazards which have been so injurious to him." This is not very forcible reasoning, for the same might be said as to any passenger. Nor is there much weight in the suggestion, made in another part of the case, that the plaintiff had equal facilities with the defendants for knowing the condition of the road. The defendants kept men in their employment for the express purpose of inspecting the road. The defendant could not lawfully even walk upon it; and even if he could, it is folly to compare his facilities in this respect with those of the owners of the road.

<sup>5</sup> *O'Donnell v. Alleghany Valley R. Co.*, 59 Penn. St. 239.

<sup>6</sup> *Nashville &c. R. Co. v. Elliott*, 1 Coldw. 611.



them, the defects of materials (using the word in a large sense) employed in the work.<sup>1</sup>

§ 89. A master is liable to his servants, as much as to any one else, for *his own* negligence.<sup>2</sup> If, therefore, a servant is injured by the personal negligence of the master, as, for example, by a defect in a thing made under his direct supervision,<sup>3</sup> or by the falling of a heavy substance down a pit which the master was personally guarding,<sup>4</sup> the servant can recover damages. And if the personal fault of the master proximately contributes to the servant's injury, it is no defense for him that the negligence of a fellow-servant (for which he was not responsible) also contributed to bring about the injury.<sup>5</sup> The negligence of any member of a firm is, of course, attributed to every

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<sup>1</sup> *Farwell v. Boston & Worcester R. Co.*, 4 Metc. 49; *Young v. N. Y. Central R. Co.*, 30 Barb. 229; *Morgan v. Vale of Neath R. Co.*, Law Rep. 1 Q. B. 149; 5 Best & S. 570; *Warburton v. Great Western R. Co.*, Law Rep. 2 Exch. 30; *Bartonshill Coal Co. v. McGuire*, 3 Macq. H. L. 300; *Bartonshill Coal Co. v. Reid*, Id. 266, 275; *Mad River &c. R. Co. v. Barber*, 5 Ohio St. 541.

<sup>2</sup> *Brydon v. Stewart*, 2 Macq. H. L. 30. In *Fifield v. Northern R. Co.* (42 N. H. 225), the complaint alleged that while the plaintiff was shacking the defendants' cars, by reason of the defendants' negligence in allowing a car to be out of repair, and in not keeping their railway cleared of snow and ice, the plaintiff was crushed and injured, without any fault on his part. Held, that the complaint was sufficient, since it might properly be construed as charging personal negligence on the part of the defendants. Doe, J., said: "If the railroad were owned by one individual, \* \* \* \* the action could be founded upon his personal negligence, and the allegation that the defect existed by reason of his negligence would be sufficient." The same point was decided in *M'Kinney v. Irish Northw. R. Co.* (Irish Rep. 2 C. L. 600).

<sup>3</sup> The defendants' servant erected a scaffolding under their immediate supervision, and they not allowing him to select staunch scantlings, some weak ones were inserted in the scaffolding, in consequence of which it fell while the plaintiff, who was also a servant of the defendants, was upon it, and injured him. Held, that the defendants were liable, on the ground of their personal interference and negligence (*Roberts v. Smith*, 2 Hurlst. & N. 212).

<sup>4</sup> The plaintiff, a servant of the defendants, who were partners, was at work at the bottom of a coal shaft. The mouth of the shaft being carelessly guarded by the defendant Walker, a piece of iron fell down the shaft, and injured the plaintiff. Held, that the defendant Walker was liable, on the ground of his personal negligence, and that the other defendant was liable, merely because he was the partner of Walker (*Ashworth v. Stanwix*, 3 El. & El. 701; affirmed, 1 Best & S. 437).

<sup>5</sup> *Cayzer v. Taylor*, 10 Gray, 274.

other partner,<sup>1</sup> and the negligence of the directors of a corporation, acting as such, is attributed to the corporation as its personal negligence.<sup>2</sup>

§ 90. It is the duty of a master (so far as he can do so by the use of ordinary care) to employ servants of sufficient care and skill to make it probable that they will not cause injury to each other by the lack of those qualities;<sup>3</sup> and if he does not use ordinary care in the selection of a servant, he is liable to all his other servants for the consequences of such negligence or incompetency on the part of the former servant as, by the use of such care, he might have foreseen would be likely to happen.<sup>4</sup> Much more is he responsible if he has actual notice of the negligent habits or incompetency of the servant employed by him.<sup>5</sup>

§ 91. The mere fact of the incompetency of a servant for the work upon which he was employed is not enough to warrant a jury in finding the master guilty of negligence in employing him; but the evidence by which such incompetency is proved may be of such a nature as to raise a fair inference that the master either had notice of the fact, or else omitted to make such inquiries as common prudence would have dictated. Thus proof of the employment of one who had always been a mere clerk, or a common laborer, to run a steam-engine, would raise 'a

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<sup>1</sup> *Ashworth v. Stanwix*, 1 Best & S. 437; 3 El. & El. 701.

<sup>2</sup> *Warner v. Erie R. Co.*, 49 Barb. 558 (since reversed on another ground, 39 N. Y. 468).

<sup>3</sup> *Curley v. Harris*, 11 Allen, 112, 121; *Chicago &c. R. Co. v. Harvey*, 28 Ind. 28.

<sup>4</sup> *Faulkner v. Erie R. Co.*, 49 Barb. 324; *Chicago &c. R. Co. v. Swett*, 45 Ill. 197; *Chicago &c. R. Co. v. Harney*, 28 Ind. 28; see *Thayer v. St. Louis &c. R. Co.*, 22 Ind. 26.

<sup>5</sup> *Gilman v. Eastern R. Co.*, 10 Allen, 233. This is conceded in all the cases cited under section 86. In *Illinois Cent. R. Co. v. Jewell* (46 Ill. 99), the fact that the incompetency of an engineer was known to some officers of the company (not apparently directors) was held sufficient to make the company liable for his fault to a brakeman.

presumption of negligence on the part of the master, without showing that he had actual notice of the servant's antecedents; for it would be improbable that the master could be so grossly deceived if he had made any inquiry; but proof that the servant had only been employed in an inferior capacity is not enough to justify an inference that the master was in fault in employing him in a much higher capacity in the same line of business.<sup>1</sup> The particular negligence of a fellow-servant to which the plaintiff's injury is owing is not, generally speaking, sufficient evidence even of his incompetency, and certainly is not enough to raise a presumption of notice to his master.<sup>2</sup>

§ 92. It is also the master's duty to use ordinary care and diligence to provide sound and safe materials and accommodations for his servants.<sup>3</sup> If, therefore, the mas-

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<sup>1</sup> So held, where the evidence was conflicting, but the plaintiff's evidence amounted to no more than this (*Edwards v. London & Brighton R. Co.*, 4 Fost. & F. 531).

<sup>2</sup> See *Murphy v. Pollock*, 15 Irish C. L. 224; *Wright v. N. Y. Central R. Co.*, 25 N. Y. 562.

<sup>3</sup> *Ryan v. Fowler*, 24 N. Y. 410; *Keegan v. Western R. Co.*, 8 N. Y. 175; *Brydon v. Stewart*, 2 Macq. H. L. 30; *Paterson v. Wallace*, 1 Id. 748; *Buzzell v. Laconia Mfg. Co.*, 48 Maine, 113; *Halloway v. Henley*, 6 Cal. 209; see *Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. 306. The master is always bound to use ordinary care and prudence to avoid exposing his servants to unreasonable dangers, and is bound to nothing beyond this (per *Isham, J.*, *Noyes v. Smith*, 28 Verm. 59). See a doubt expressed as to the existence of this obligation in *Seaver v. Boston & Maine R. Co.* (14 Gray, 466). It is the duty of every employer to use all reasonable precautions for the safety of his employees, by giving them suitable machinery, &c., and keeping it in a condition not to endanger their safety; and bridges, passage-ways, ladders, &c., used in the work by the employees should be kept safe and convenient by the employer (*Buzzell v. Laconia Mfg. Co.*, 48 Maine, 113). A., with other workmen, was in the employ of the defendant, the owner of a coal mine. Becoming discontented, the workmen resolved not to work any longer unless certain conditions were complied with. While coming up from the pit in which they were working, A. was killed by a stone falling on him from the side of the pit which had been left there by the defendant's personal fault. In an action by his widow, it was held, on appeal to the House of Lords, that the defendant was liable, on the ground that having let the workmen down, he was bound to bring them up in safety, even if they came up for their own business; that the master was bound to protect his servants, *eundo, morando et redeundo*; and that it made not the slightest difference that, at the time of the accident, the servant was leaving his

ter knows,<sup>1</sup> or would have known if he had used ordinary care,<sup>2</sup> that the buildings or materials which he provides for the use of his servants are unsafe, he is certainly answerable for injuries caused thereby to his servants. Thus the

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work without lawful excuse or proper cause (*Brydon v. Stewart*, 2 Macq. H. L. 80). Yet where an actress, while passing off the stage, fell through an open trap-door, and was injured, it was held that the proprietor was under no obligation to keep such places lighted and guarded, Coleridge, J., remarking: "The real question is, whether the duty arises from the relation in which the parties stood. It seems to me if we were to hold that it did, the consequence would be that, whenever the same relation existed, we would have to infer duties that have never yet been held to exist. The servant is not bound to enter the master's service; but if he does, and he finds things in a certain state, he must take the consequences, if any, that may occur owing to such a state of things," (*Seymour v. Maddox*, 16 Q. B. 326). In *Chicago &c. R. Co. v. Swett* (45 Ill. 197), the language of the court goes very far in favor of servants, holding that masters are bound to provide good and safe accommodations and materials.

<sup>1</sup> *Ryan v. Fowler*, 24 N. Y. 410; *Keegan v. Western R. Co.*, 8 N. Y. 175; *Cayzer v. Taylor*, 10 Gray, 274.

<sup>2</sup> The plaintiff was in the employ of the defendants as engineer, and had charge of an engine with a defective fire-box, of which neither plaintiff nor defendants were aware. In consequence of such defect an explosion occurred, by which the plaintiff was injured. The defendants might have discovered the defect by the exercise of proper care and vigilance. Held, that they were responsible (*Noyes v. Smith*, 28 Verm. 59). Where a truck fell upon the plaintiff, by means of a defect in the hoisting apparatus negligently furnished by the defendant (his employer), the plaintiff not knowing of the defect, it was held that the defendant was liable. *Thurman, C. J.*, said: "The general rule is, that an employer, who provides the machinery and oversees and controls its operation, must see that it is suitable; and if an injury to the workman happens by reason of a defect unknown to the latter, and which the employer, by the use of ordinary care, could have cured, such employer is liable for the injury" (*McGatrick v. Wason*, 4 Ohio St. 566). The husband of the plaintiff was engaged in shoring up an arch, under the orders of the defendant. During the progress of the work the arch fell, by which the husband was killed. Held, that if the defendant had reasonable cause to apprehend the danger of the arch falling, and the deceased had not, the defendant was liable (*Ogden v. Rummens*, 3 Fost. & F. 751). So, where a servant was injured by the fall of a pole which had been in the earth two years, and there was evidence tending to show that it ought not to have been left in the ground so long, *Cockburn, C. J.*, held, that if the jury believed that the pole had been left an unreasonable time without examination, they might find against the master (*Webb v. Rennie*, 4 Fost. & F. 608). The plaintiff was working for the defendant on an engine, the weight of which came upon a tramway, which gave way, and the engine fell and injured the plaintiff. A verdict for the plaintiff was set aside, for want of sufficient evidence of notice to the defendant (*Feltham v. England*, Law Rep. 3 Q. B. 33). The plaintiff's son was at work for the defendant under a cylinder suspended by chains and bolts, and the tackle being insufficient for the purpose, the cylinder fell and killed the plaintiff's son. The manner in which the cyl-

master has been held liable for injuries suffered by his servants from defects in a ladder,<sup>1</sup> in the shaft of a mine,<sup>2</sup> in buildings,<sup>3</sup> and in machinery,<sup>4</sup> of which the master was aware, and the servants were not. When the master's occupation is such as to make him personally familiar with the nature of the materials which ought to be employed in his business, a servant employed therein, who has not the same familiarity with its requirements, has a right to rely on the judgment of the master, and the master may be presumed to be in fault if the proper materials have not been used.<sup>5</sup> But if the master has given such orders

inder was suspended was unusual and dangerous, and was suggested by the defendant himself. Held, that the defendant was liable to the plaintiff for the injury (*Weens v. Mathieson*, 4 Macq. H. L. 215). The case of *Potts v. Plunkett* (9 Irish C. L. 290) appears to us to be irreconcilable with the principle of the foregoing decisions, and it should not be followed. That case was as follows: The plaintiff, while in the service of the defendant, was injured by a fall occasioned by a defect in a landing erected under the immediate supervision of the defendant himself. It did not appear that the defendant was aware of the defect. Held, that the defendant was not responsible without proof of his *knowledge* of the defect. Where a servant was injured by the giving way of wood which had been allowed to remain in the soil an unreasonable length of time, he was held entitled to recover against his master (who owned the wood and soil) without proof of an actual scienter (*O'Donnell v. Allegheny Valley R. Co.*, 59 Penn. St. 239).

<sup>1</sup> *Williams v. Clough*, 3 Hurlst. & N. 258.

<sup>2</sup> *Mellors v. Shaw*, 1 Best & S. 437. The same decision was made by the House of Lords in a precisely similar case, brought by appeal from Scotland (*Brydon v. Stewart*, 2 Macq. H. L. 30. See also *Buzzell v. Laconia Mfg. Co.*, 48 Maine, 113).

<sup>3</sup> Thus where the plaintiff was employed in the defendant's mill, and in consequence of the want of a proper support to a privy on the premises, of which the defendant was aware, it gave way, injuring the plaintiff, the defendant was held liable (*Ryan v. Fowler*, 24 N. Y. 410).

<sup>4</sup> Where the plaintiff, a fireman employed by the defendants, was injured by the explosion of the boiler of the locomotive on which he worked, the defective and dangerous condition of which had often been reported to the defendants, they were held liable (*Keegan v. Western R. Co.*, 8 N. Y. 175; see *Cayzer v. Taylor*, 10 Gray, 274).

<sup>5</sup> Where an employee, who was not a ship-carpenter or a joiner, or a mechanic of any kind, and who knew nothing about the construction of scaffolding, or the forces which it would be required to resist, was put into the hold of a gunboat by his employer, to remove the chips and rubbish from beneath a scaffold, it was held that he had right to rely upon the superior knowledge of his employer, who was a ship-builder, and to assume that the employer had used due care to provide scaffolding of sufficient strength to insure him against all harm (*Conolly v. Poillon*, 41 Barb. 366).

to the proper servants as would prevent any harm from being done by dangerous or defective materials, he is exonerated from liability to them and to all his other servants in the same general employment.<sup>1</sup>

§ 93. It is also the duty of the master, so far as he can by the use of ordinary care, to avoid exposing his servants to extraordinary risks, which they could not reasonably anticipate,<sup>2</sup> though he is not bound to guarantee them against such risks.<sup>3</sup> One who employs servants in a complex and dangerous business ought to prescribe rules sufficient for its orderly and safe management.<sup>4</sup> His failure to do so is a personal negligence, for the consequences of which he is liable to his servants. Thus a railroad company is bound to regulate the time and manner of running its trains, so as to avoid collisions, and to enable all its servants to know when a train may be expected, and thus to avoid danger.<sup>5</sup>

§ 94. It is obvious, however, that an employer may relieve himself of all common law liability for accidents

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<sup>1</sup> See *Durgin v. Munson*, 9 Allen, 396; *Smith v. Dowell*, 3 Fost. & F. 238.

<sup>2</sup> The plaintiff was employed by the defendants to cut up the carcasses of cattle. He did not know, but the defendants did, that in cutting them up he would expose himself to danger, on account of the diseased state of the flesh, and he was injured from that cause. Held, that the defendants were liable, as in not informing him of the fact of danger they did not take all reasonable precautions for his safety (*Davies v. England*, 10 Jur. [N. S.] 1235).

<sup>3</sup> *Riley v. Baxendale*, 6 Hurlst & N. 446.

<sup>4</sup> A servant of a railroad company was engaged between two cars, in repairing one of them: while so engaged other cars were shifted upon the track, and pushing the former cars together, crushed the servant to death. The man who shifted the cars was acting conformably to all the rules of the company, but the rules made no provision by which the deceased could be warned of his danger. Held, that the company was liable for the injury, as the natural consequence of its neglect to provide sufficient rules (*Vose v. Lancashire & Yorkshire R. Co.*, 2 Hurlst. & N. 728).

<sup>5</sup> A railroad company has been held liable for an injury occasioned to its servant by a train started at a time not fixed by the regular schedule (*Haynes v. East Tennessee R. Co.*, 3 Coldw. 222). This would not be right, however, unless the train was sent out by the chief authority of the company.

occurring to his servants, through defects in materials or in the character of fellow-servants, by giving explicit warning of such defects, and notice that he does not intend to remedy them. For servants remaining after such a warning must be deemed to assume the risk for themselves, as much as if it were one of the ordinary risks of the business. The courts have gone further than this, and hold that if a servant knows that a fellow-servant is habitually negligent,<sup>1</sup> or that the number of servants employed is insufficient,<sup>2</sup> or that the materials with which he works are defective,<sup>3</sup> and continues his work without being induced by his master to believe that a change will be made, and without plainly objecting, he is deemed to have assumed the risk of such defects. For it is often impracticable for the master to obtain suitable materials or com-

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<sup>1</sup> *Frazier v. Pennsylvania R. Co.*, 38 Penn. St. 104.

<sup>2</sup> Where the plaintiff was injured while working for defendants, in consequence of want of sufficient assistance, and it was proved that he had for a long time previous, and without any objection, done the same work without assistance, it was held that he was not entitled to recover (*Skipper v. Eastern Counties R. Co.*, 9 Exch. 223; *Mad River &c. R. Co. v. Barber*, 5 Ohio St. 541, 563).

<sup>3</sup> *Loonam v. Brockway*, 3 Robertson, 74; 28 How. Pr. 472; *Mad River &c. R. Co. v. Barber*, 5 Ohio St. 541, 562. Where a servant was injured by a defect in machinery, and it was proved that he had used it voluntarily, knowing its defects, the master was held not liable (*Griffiths v. Gidlow*, 3 Hurlst. & N. 648; *McGlynn v. Brodie*, 31 Cal. 376). Where the declaration stated that the plaintiff was injured while necessarily passing over the defendants' bridge in going to or returning from the defendants' work, and that through the defendants' negligence it became insecure and broke, injuring the plaintiff, it was held, that the declaration should have alleged that the defendants knew or might have known of the insufficiency of the bridge, and that the plaintiff was unaware of it. *Appleton, J.*, said: "If the danger is known and the servant chooses to remain, he assumes, it would seem, the risk, and cannot recover. He might leave if he chose, but, choosing to remain, he cannot remain at the risk of the master" (*Buzzell v. Laconia Mfg. Co.*, 48 Maine, 113. See *Paterson v. Wallace*, 1 Macq. H. L. 748). The plaintiff's intestate was employed by the defendants to work in a coal mine, passage to and from which was obtained by means of a cage suspended by a rope. The defendants knew that their servants habitually neglected to test the sufficiency of the rope. The deceased knew of this neglect, and was told by the servant having charge of the rope that he had better examine it before descending, but did not do so. While he was descending the rope broke, and he was killed. Held, that the defendants were not responsible (*Senior v. Ward*, 1 El. & El. 385).

petent servants ; and he is compelled to use such materials and assistance as he can get, although not suitable. The law does not absolutely prohibit him from doing this ; and although it holds him responsible to strangers who are injured thereby, it leaves his servants free to insist upon their rights, or to waive them, as they may see fit. No matter how great may be the danger to which a defect in the building or materials may expose the servant, yet if he remains in service, knowing that the master does not intend to repair it, he takes upon himself the risk of injury therefrom. Upon the same principle, where the servant's action is founded upon the assumption that the master ought to have known of the defect which caused the injury, it is clearly a sufficient defense to show that the servant had equal means of knowledge.<sup>1</sup>

§ 95. This rule has, however, been very properly held to be applicable only to such defects as the servant ought reasonably to have foreseen might endanger his safety. If a person of ordinary prudence would not have believed that the servant could, in the regular discharge of his duties, be injured by the defect, the servant may properly disregard it, without losing the right to complain if, while pursuing his ordinary course, he suffers from such defect.<sup>2</sup> And so, we think, if the danger is one which a person of ordinary prudence would believe could be entirely avoided by the use of certain additional precautions, the servant would not, by continuing in his service, lose his right to recover for damage suffered by him while using such precautions.<sup>3</sup>

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<sup>1</sup> *Loonam v. Brockway*, 3 Robertson, 74 ; 28 How. Pr. 472 ; see *Illinois Centr. R. Co. v. Jewell*, 46 Ill. 99.

<sup>2</sup> *Snow v. Housatonic R. Co.*, 8 Allen, 441 ; see *Perry v. Marsh*, 25 Ala. [N. S.] 659.

<sup>3</sup> This is vaguely implied, in the opinion of Bartley, J., in *Mad River &c. R. Co. v. Barber*, 5 Ohio St. 541, 562, 565.



§ 96. It must be admitted that this doctrine has been sometimes pushed too far, and that the mere continuance of a servant in his work has been treated as conclusive evidence of his having waived objections to defects in his associates or his materials.<sup>1</sup> Such rulings are unjust, because a servant has the same right to complete his contract in reliance upon its original terms that any one else has. A party to any other contract having mutual obligations is allowed to perform fully his part, notwithstanding the failure of the other party to fulfill a condition precedent, without *necessarily* waiving his right to insist upon performance of such condition at a later period. It is not fair to require from servants a more peremptory assertion of their rights against their masters, than would be required between parties standing upon a more equal footing. Indeed, the dependent position of servants generally makes it reasonable to hold any notice on their part sufficient, however timid and hesitating, so long as it plainly conveys to the master the idea that a defect exists, and that they desire its removal. The doctrine itself is but a branch of the general law of waiver;<sup>2</sup> and the real question to be determined in each case is whether, under all the circumstances, the master had a right to believe, and did believe, that the servant intended to waive his objection to the unfitness of his fellow-servant, or the defect in the materials provided for the work. There can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as it would be rea-

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<sup>1</sup> So it seems to have been held in *Mad River &c. R. Co. v. Barber*, 5 Ohio St. 541; and see *Wright v. N. Y. Central R. Co.*, 25 N. Y. 562, 569.

<sup>2</sup> In *Clarke v. Holmes* (7 Hurlst. & N. 937), it is spoken of as a branch of the rule concerning contributory fault. So it is in *Mad River &c. R. Co. v. Barber* (5 Ohio St. 541, 564); but in the same opinion (p. 562) the theory of our text is clearly adopted; and this, we are satisfied, is the correct view.

sonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept.<sup>1</sup>

§ 97. Where the servant is an infant of such tender years as to be incapable of appreciating the danger to which he is exposed, or unable to resist the control of the guardian placing him in such a position, his knowledge of the danger ought not to be taken into account in considering his right to recover for an injury caused thereby;<sup>2</sup> though it would be a proper subject for consideration in an action brought by his guardian for loss of service, if communicated by him to the guardian. Whether the rule which deprives a servant of the right to recover for risks of which he was aware is founded upon the doctrine of waiver or upon that of contributory fault, it is in either aspect inapplicable to the case of a mere child. A child cannot waive his rights, nor can his guardian waive them for him; and, even if he could be said to contribute to the injury by knowingly incurring the risk, the master's negligence, in continuing to employ him in circumstances of danger which

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<sup>1</sup> The plaintiff was employed by the defendant to oil dangerous machinery. At the time the plaintiff entered upon the service the machinery was fenced, but the fence became broken by accident. The plaintiff complained of the dangerous state of the machinery, and the defendant promised him that the fencing should be restored. The plaintiff, without any negligence on his part, was severely injured in consequence of the machinery remaining unfenced. Held, that the defendant was liable for the injury (*Clarke v. Holmes*, 7 Hurlst. & N. 937; affirming *Holmes v. Clarke*, 6 Id. 349). Where the plaintiff's intestate remonstrated with the defendant's agent in charge of the mine, on account of the dangerous position of a large stone, and the agent sent persons to remove it, but, before they began work, it fell upon the deceased, while pursuing his work, causing his death, it was held, that the plaintiff could recover (*Paterson v. Wallace*, 1 Macq. H. L. 748; see *Holmes v. Worthington*, 2 Fost. & F. 533).

<sup>2</sup> This question was raised, but not decided, where an infant, ten years old, while in the employ of the defendant, was injured, by the machinery which he was using being left uncovered (*Hayden v. Smithville Man'g Co.*, 29 Conn. 548). Compare *post*, p. 128, note 1.

the child could not appreciate or avoid, is surely the most proximate cause of the injury.

§ 98. A servant's knowledge of his master's character and habits does not protect the master from liability for the *direct* consequences of his own negligence. For these he is liable, no matter how well he is known by his servants to be of negligent habits. Nor, indeed, does any knowledge of his general negligence deprive his servant of remedy for the proximate, though indirect, results of his negligence in particular things. It is only where a servant knows that a particular duty has not been performed, has no reason to expect that it will be, and does not insist that it shall be, that he is deprived of the right to complain of its neglect. Therefore a servant is not affected in his rights by his knowledge that his master is in the habit of employing incompetent servants, or of furnishing dangerous materials to his workmen, or of omitting to provide adequate safeguards, or of neglecting that part of the work to which he personally attends. Thus, a miner loses no right by engaging in the service of a mine owner who is generally reputed to be careless of the lives of his men, or too economical to be willing to provide suitable shafts, chains, or supports. But if the miner saw that the shaft was in bad order, before descending it, he could not recover from his master for an injury received in consequence of the defective condition of the shaft, though such defect were known to the master. So an engineer upon a railroad is not prejudiced by his knowledge that the road has a bad reputation for excessive economy in its rolling stock, if his own engine appears to be in a good condition; but if he knows that engine to be dangerous, he assumes the danger as his own risk, by continuing to run the engine.

§ 99. In actions brought by servants against their masters, the burden of proof as to the master's knowl-

edge, or culpability in lacking knowledge, of the defect which led to the injury, whether in the character of a fellow-servant, or in the quality of materials used, rests upon the plaintiff.<sup>1</sup> But, the plaintiff having proved the fault of the master in this respect, the burden of proving that the plaintiff also knew of such defect, and commenced or continued his service with such knowledge, rests upon the defendant. This fact being proved, it is then for the plaintiff to show, if he can, that the defendant induced him to continue his work, by promising to remedy the defect.

§ 100. A "fellow servant," within the meaning of the rule laid down at the beginning of this chapter, is generally held to be any one serving the same master, and under his control, whether equal,<sup>2</sup> inferior, or superior<sup>3</sup> to the injured person, in his grade or standing. No extent of difference in their wages, social position, or work, affects the relation of servants of the same master, so long as they are employed in one general business. Thus, a merchant's clerk, though (as is frequently the case) the equal of his employer in social position, is, in the eye of the law, a fellow-servant with the boy who sweeps out the

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<sup>1</sup> Kunz v. Stuart, 1 Daly, 431; Beaulieu v. Portland Co., 48 Maine, 291; McMillan v. Saratoga &c. R. Co., 20 Barb. 449; Columbus & Xenia R. Co. v. Webb, 12 Ohio St. 475. In McMillan v. Saratoga &c. R. Co. (*supra*), it was held, that if the complaint did not allege the fact of knowledge, &c., it would be bad on demurrer. In M'Kinney v. Irish Northw. R. Co. (Irish Rep. 2 C. L. 600), it was held, on appeal, that a general allegation of negligence was sufficient on demurrer. Compare Smyly v. Glasgow &c. Steam Co., Irish R. 2 C. L. 24.

<sup>2</sup> A railway company is not liable to a brakeman in their employ for injuries sustained by the neglect of another brakeman to properly attend to his brake, even though the latter was, at the time, acting as the conductor of the train (Hayes v. Western R. Co., 3 Cush. 270).

<sup>3</sup> Wilson v. Merry, Law Rep. 1 S. & D. 326; Faulkner v. Erie R. Co., 49 Barb. 324; Feltham v. England, Law Rep. 2 Q. B. 33; 7 Best & S. 676; Gallagher v. Piper, 16 C. B. [N. S.] 669; Searle v. Lindsay, 11 C. B. [N. S.] 429; Brown v. Accrington Co., 3 Hurlst. & C. 511; O'Connell v. Baltimore & Ohio R. Co., 20 Md. 212; Thayer v. St. Louis &c. R. Co., 22 Ind. 26.

store and lights the fires. So the engineer and brakemen of a train,<sup>1</sup> the first and third engineers of a steamship,<sup>2</sup> and the foreman and subordinate workmen in a shop,<sup>3</sup> are all fellow-servants within the meaning of the rule. The fact that the injured servant was under the control of the servant by whose negligence the injury was caused, makes no difference.<sup>4</sup> And a servant who was formerly employed by the same master is, in respect to his negligence while so employed, to be considered the fellow-servant of another, who, being subsequently engaged, is injured by the result of such negligence.<sup>5</sup>

§ 101. Mere co-operation, or community of labor and ultimate purpose, is not enough to make men fellow-

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<sup>1</sup> *Sherman v. Rochester & Syracuse R. Co.*, 17 N. Y. 153; *Wright v. N. Y. Central R. Co.*, 25 Id. 562.

<sup>2</sup> The plaintiff was employed by the defendants as third engineer on board their vessel. While turning a winch, one of the handles came off, and, in consequence, the plaintiff was injured. He was turning the winch by orders of the chief engineer, who knew that the winch was out of order, but was, nevertheless, a competent person. There was no evidence of personal negligence on the part of the defendants. Held, that the chief engineer and the plaintiff were fellow-servants, and, therefore, that the defendants were not responsible (*Searle v. Lindsay*, 11 C. B. [N. S.] 429).

<sup>3</sup> A servant cannot recover against his master for injuries sustained in his service from the negligence of the foreman or manager, whose lawful directions the servant was bound to obey (*Feltham v. England*, Law Rep. 2 Q. B. 33; 7 Best & S. 676).

<sup>4</sup> *Feltham v. England*, Law Rep. 2 Q. B. 33; 7 Best & S. 676; *Searle v. Lindsay*, 11 C. B. [N. S.] 429; *Brown v. Accrington Co.*, 3 Hurlst. & C. 511; *Wilson v. Merry*, Law Rep. 1 S. & D. 326; *Murphy v. Pollock*, 15 Irish C. L. 224; *Sherman v. Rochester & Syracuse R. Co.*, 17 N. Y. 153; *Weger v. Pennsylvania R. Co.*, 55 Penn. St. 460; *Hayes v. Western R. Co.*, 3 Cush. 270. It has been otherwise decided in Ohio (*Cleveland, Columbus & C. R. Co. v. Keary*, 3 Ohio St. 201). In that case, the injured servant was a brakeman, subject to the orders of the conductor, by whose negligence the injury was caused. The court unanimously held the company liable: *Ranney, J.*, delivering a very able opinion. That decision, however, has been since restricted to cases in which the injury was caused by the negligence of a servant having control over the injured servant. In every other case, superiority of position makes no difference (*Pittsburg, Ft. Wayne & C. R. Co. v. Devinney*, 17 Ohio St. 197). See further on this point, § 105. In Georgia, it is held that no one is to be deemed a fellow-servant who was not so engaged that the injured servant could have taken precautions against the former's negligence (*Cooper v. Mullins*, 30 Geo. 146).

<sup>5</sup> *Wilson v. Merry*, Law Rep. 1 S. & D. 326.

servants. They are not fellow-servants unless they are all under the control and direction of a common master. Therefore, where a servant works side by side with one employed by his master as an independent contractor,<sup>1</sup> or with a servant of such contractor,<sup>2</sup> they are not fellow-servants, even though they help to do the same work, for the benefit of the same ultimate employer; and the master of the former servant is, therefore, responsible for an injury caused by the servant's negligence in such work, either to the contractor, or to the contractor's servant. Still more clear is it that, where two or more employers use the same property for their respective purposes, the servants of one do not become fellow-servants with the servants of the other, by their concurrent use of the same thing. Therefore, a servant of a railroad company, employed in its service upon a section of road used by it in

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<sup>1</sup> The defendants employed the plaintiff by contract, to land and carry into their warehouse certain bags of guano, and employed others, upon ordinary wages, to pile the guano. Held, that the defendants were liable to the plaintiff for the negligence of the servants who did the piling (*Fletcher v. Peto*, 3 Fost. & F. 368).

<sup>2</sup> The plaintiff was the servant of a carter employed to receive and cart goods from the defendants' warehouse. The defendants' servants, by their negligence in lowering the goods, allowed a bale to fall upon the plaintiff. Held, that the defendants were responsible, as the plaintiff and the defendants' servants were not fellow-servants (*Abraham v. Reynolds*, 5 Hurlst. & N. 143). Pollock, C. B., said: "Here it is said that there was common work. If it was agreed that this work should be done by all, the rule might apply; but it does not apply, merely because the parties had a common object, if they had separate ends, and, for some purposes, antagonistic interests" (*Id.*) A certain person contracted with the defendants to repair a bridge on their track, and hired the plaintiff by the day to work for him under that contract. While thus working, the plaintiff was injured by a passing train of the defendants'. Held, that the defendants were liable, the plaintiff not being their servant, or in any privity with them (*Young v. N. Y. Central R. Co.*, 30 Barb. 229; *Donaldson v. Mississippi &c. R. Co.*, 18 Iowa, 280). In *Michigan Central R. Co. v. Leahey* (10 Mich. 193), a similar question was presented, and the court were equally divided in opinion. It should hardly be necessary to say that the owner is not liable to a contractor's servants for the contractor's negligence (*Hunt v. Pennsylvania R. Co.*, 51 Penn. St. 475). It may be worth while to mention that during the existence of slavery, a hired slave was not regarded as a fellow-servant with a free servant of the same employer, in such a sense as to deprive his owner of the right to recover for injury to him caused by the free-man's negligence (*White v. Smith*, 12 Rich. Law, 595). Happily, decisions upon points like this are now of little importance.

common with another corporation, under a mutual contract between the companies, may recover damages against that corporation, for injuries sustained by reason of the negligence of its servant.<sup>1</sup> And where one corporation hires from another the use of its track, a servant of the former can recover from the latter for any injury caused by defects in the track,<sup>2</sup> and a servant of the latter corporation may recover from the former for the negligent management of its trains:<sup>3</sup> the servants of neither being fellow-servants with those of the other.

§ 102. One to whom his employer commits the entire charge of the business, with power to choose his own assistants, and to control and discharge them as freely and fully as the principal himself could, is not a *fellow-servant* with those who are employed under him; and the master is answerable to all the under-servants for the negligence of such a managing assistant, either in his personal conduct within the scope of his employment,<sup>4</sup> or in his selec-

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<sup>1</sup> *Sawyer v. Rutland & Burlington R. Co.*, 27 Verm. 370; *Warburton v. Great Western R. Co.*, Law Rep. 2 Exch. 30; 4 Hurlst. & C. 695. The defendant allowed its track to be used by another railway company, receiving a compensation therefor, and engaging to keep the road in good order, supplied with proper switches, and properly watched for both the companies. In consequence of the negligence of the defendant's switchtender, and of the defendant in not using an improved switch, the cars of the other railroad, on which the plaintiff's intestate was engineer, were thrown from the track, and he was killed. Held, that the switchman not being the servant of the other railway, the defendant was liable to the plaintiff (*Smith v. N. Y. & Harlem R. Co.*, 19 N. Y. 127).

<sup>2</sup> *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Graham v. Northeastern R. Co.*, 18 C. B. [N. S.] 229.

<sup>3</sup> *Catawissa R. Co. v. Armstrong*, 49 Penn. St. 186. So a contractor has been held liable for the negligence of his servants, to the servant of a sub-contractor (*Curley v. Harris*, 11 Allen, 112; but compare *Wiggett v. Fox*, 11 Exch. 832). The decision in *Winterbottom v. Wright* (10 Mees. & W. 109) cannot stand upon the ground that the injured party, and the party in fault in that case, were fellow-servants. It stands upon another and satisfactory basis, unconnected with this subject.

<sup>4</sup> See *Murphy v. Smith*, 19 C. B. [N. S.] 361; *Paterson v. Wallace*, 1 Macq. H. L. 748.

tion of other servants.<sup>1</sup> Such at least appears to us to be the rule sanctioned by the weight of authority and by sound reason, though it must be admitted that it is not everywhere established as law. The contrary rule prevails in Massachusetts, where we think the courts have had a tendency to narrow the remedies for negligence by technical and unsound decisions, and especially to favor corporations and employers at the expense of servants.<sup>2</sup> If the Massachusetts doctrine should be adopted, it would afford complete immunity to a large class of employers, such as railroad companies, owners of large factories,

<sup>1</sup> Where the defendants authorized a general agent to employ engineers, and through his negligence in employing an incompetent engineer the plaintiff, a brakeman of the defendant, was injured by a collision,—held, that the defendant was liable (*Wright v. N. Y. Central R. Co.*, 28 Barb. 80; reversed on other grounds, 25 N. Y. 562). Where the owner of a vessel employed a captain to take entire charge of it, with power to hire and discharge subordinate employees, and the captain retained an incompetent engineer in his service, knowing his incompetency, whereby an injury occurred to a fellow-servant, the owner was held liable. Phelan, J., said: "The law will not allow a master whose duty it is to employ none but men of ordinary care and skill in all branches of the service, to devolve the duty of making such employment on his general manager, who may be irresponsible, and by such means become irresponsible himself" (*Walker v. Bolling*, 22 Ala. St. 294). A late English *nisi prius* decision seems to go still further. The defendants' foreman gave a girl under sixteen years of age charge of a dangerous hemp machine, of which she was ignorant, and neglected to instruct her in its use, and gave a positive order that she should put particles of hemp between the rollers without stopping the machine, in consequence of which her fingers and arm were crushed. Held that the defendants were liable for negligence. Cockburn, C. J., said: "Now, if either of these grounds of negligence are sustained, the defendants would be liable, for I am of opinion that if the owners of dangerous machinery, by their foremen, employ a young person about it, quite inexperienced in its use, either without proper directions as to its use, or with directions which are improper, and which are likely to lead to danger of which the young person is not aware, and of which they are aware, as it is their duty to take reasonable care to avert such danger, they are responsible for any injury which may ensue from the use of such machinery" (*Grizzle v. Frost*, 3 Fost. & F. 622).

<sup>2</sup> Where the proprietors of a manufacturing establishment employed a competent superintendent, who hired and discharged the operatives, and through his negligence an injury occurred to an operative, it was held that the operative and superintendent were fellow-servants, and therefore that the proprietors were not responsible (*Albro v. Agawam Canal Co.*, 6 Cush. 75). The same plaintiff afterwards sued the superintendent in fault, but was again nonsuited: the Supreme Court holding that the servant's wages covered all risks of the kind (*Albro v. Jaquith*, 4 Gray, 99). On this decision we comment elsewhere.



foundries, mines, &c., who are accustomed, and indeed often compelled, to entrust the selection of almost all their servants to one or more superintendents. It would be almost impossible to prove that a superintendent had a reputation for selecting incapable subordinates, and that his employer was aware of it.; yet upon the theory which holds a general superintendent to be only a fellow-servant with those whom he employs, such proof would be necessary in order to maintain an action by one of the servants against the common employer on account of the negligence of another servant.<sup>1</sup>

§ 103. Some difficulty has been found in giving a generic name to the person for whose acts their employers are to be thus held accountable to their other servants. The word "manager" has been objected to as vague, although it has been used in cases of good authority, and the phrase "vice-principal" mentioned as preferable.<sup>2</sup> Whatever word may be finally agreed upon, it should be understood that it includes every servant to whom the master deposes the power of appointment and dismissal. These powers are essentially among the attributes of a master. While the law permits him to delegate his authority in these as well as in other respects, it does not permit him, by the simple fact of such delegation, to relieve himself of all responsibility for the mode in which these

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<sup>1</sup> In *Wilson v. Merry* (Law Rep. 1 S. & D. 326), Lords Cairns and Chelmsford delivered opinions which strongly support the Massachusetts doctrine; but such a ruling was not necessary to the decision of the case, and Lords Cranworth and Colonsay did not expressly concur in it. It may very well be, however, that these opinions will be regarded as binding authority in Great Britain and Ireland.

<sup>2</sup> A boy who was engaged by the defendant to do a different kind of work was, by the negligent direction of a superior fellow-servant, employed in stirring a highly explosive mixture. While stirring it the boy was killed by the explosion. Held, that if the servant giving the direction was acting as vice-principal, the defendant was liable to the boy's representatives for his death. A rule to enter a nonsuit against the plaintiff was, however, made absolute by reason of there being no sufficient evidence that the superior servant was acting as vice-principal (*Murphy v. Smith*, 19 C. B. [N. S.] 361).

powers are exercised. Nor is it an implied condition of a servant's contract that he shall take the risk of the selection of fellow-servants by a deputy of his master, and absolve the master from all care and responsibility for such selection.

§ 104. Supposing, however, that the master delegates to a superintendent only *one* of these powers, so that he can appoint but not remove, or can remove but not appoint,—how is such a superintendent to be regarded? Sound reason, we think, brings him within the same rule. Both the employment and the discharge of servants are matters peculiarly within the province of the master; and by dividing these powers between different persons he would increase the probabilities of inefficient management, and of consequent greater risk to his servants from each other's negligence. It would be contrary to wise policy to permit him to do so with impunity.

§ 105. The rule established upon this subject in some of the western states is more liberal to the servant. Thus in Kentucky it is held, that the liability of a master to his servants for the negligence of his fellow-servants is regulated by a consideration of the relative position of the servant in fault and the servant injured. The master is not liable to his servant for any injury committed by a servant of equal degree in the same sphere of employment, unless some negligence is fixed upon the master personally. But he is liable to his servant for the *gross* negligence of a servant superior in rank to the servant injured; and he is liable for the *ordinary* negligence of a servant not engaged in the same department of service.<sup>1</sup> And in Ohio it is held that

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<sup>1</sup> Louisville & Nashville R. Co. v. Collins, 2 Duvall, 114. The action was brought by Collins, a common laborer, to recover damages for the negligence of an engine-driver employed by the railroad company, who started the engine while the plaintiff was working under it, and cut off both his legs. The plaintiff recovered \$5,000 damages, and the Court of Appeals affirmed the judgment, although the engine-driver was proved to be a competent and usually careful man.

where the master places one of his servants under the control and direction of another who represents the master, he is liable to the former for injuries caused by the negligence of his superior.<sup>1</sup>

§ 106. One who, without being employed to do so, assists servants at their work, is deemed to be their fellow-servant within the meaning of the general rule, so as to limit the liability of the master to him, even though he would not be regarded as a servant in such a sense as to make the master liable to strangers for his negligence.<sup>2</sup>

<sup>1</sup> Little Miami R. Co. v. Stevens, 20 Ohio, 415. See *Mad River &c. R. Co. v. Barber*, 5 Ohio St. 541, 563. Thus where a brakeman was injured by a collision, occurring through the negligence of a conductor whose orders he was bound to obey, it was held that the company was liable to him; Ranney, J., saying: "The law, therefore, exacts of him who puts a force in motion, that he shall skillfully and carefully control it, and with a skill and care proportioned to the power of the person he thus employs. \* \* \* \* What he can do for himself he can, if his interest, convenience, or pleasure require it, do by another; \* \* and as it is still used for his benefit and by his direction, he cannot in this manner release himself from any part of the obligation he owes to others to use it with reasonable care and skill" (*Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201). So where an engineer was allowed to use an old timetable, through the negligence of the conductor of his train or the superintendent of the road, and, in consequence, a collision occurred by which he was injured, it was held, that the company was responsible to the engineer for the negligence of the company's representative (*Little Miami R. Co. v. Stevens*, 20 Ohio, 415). *Hitchcock, C. J.*, said: "It is because this injury resulted from the negligence of the company itself, or of an agent whose duty it was to give the notice before referred to, that I hold the judgment should be affirmed" (*Ib.*). *Caldwell, J.*, said: "It is a general rule that a person, in the management of his business, whether he does it himself, or acts through agents, must so conduct that business as not to interfere with the rights of, or produce injury to others. This devolves on the party care and prudence in the management of his business, and renders him civilly responsible for any injury that may result to others from the want of such care and prudence, whether the injury may be done under his own immediate supervision, or under the control of his agents" (*Ib.*). *Spalding, J.*, dissented, on the ground that the superintendent was not negligent, but a fellow-servant, the conductor, was, and that the engineer also was, both of which points were doubtful under the evidence given.

<sup>2</sup> *Degg v. Midland R. Co.*, 1 Hurlst. & N. 773; *Potter v. Faulkner*, 1 Best & S. 800. In *Potter v. Faulkner* (1 Best & S. 800), *Erle, C. J.* said: "This is the case of one who volunteers to associate himself with the defendant's servant in the performance of his work, and that without the consent or even the knowledge of the master. Such an one cannot stand in a better position than those with whom he associates himself in respect to their master's liability; he can impose no greater obligation upon the master than that to which he was subject in respect of a servant in his

This is so, where such assistance is given at the request of the servants; and it can make no difference in his favor that the person rendering such assistance does so unasked, or even against the will of the master, or of the servants, or of both. In such case he may be a trespasser; and if so, he diminishes his right to recover for an injury received under such circumstances, by his contributory fault. On the other hand, if his assistance is rendered at the request of the master, he becomes for the time a servant in every legal sense.

§ 107. It is not every act of literal assistance to a servant that makes the person doing it an "assistant" within the scope of the term as we have just used it. The act must be done with the intention of rendering a service. If done for the immediate benefit of the person doing it, and he assists others only because he cannot otherwise effect his own purpose, he may be a trespasser, but he is not in any sense a servant. Thus, if a horse is running away, and is stopped by a person otherwise in danger of being run over, such person does not thereby become in any degree a servant of the owner of the horse. So one, whose house is threatened by the spread of a fire in his neighbor's, does not lose any rights as a stranger by helping to put out the fire. Of course, there will often be great difficulty in determining what is the controlling motive in such cases, but this is a difficulty inseparable from the practical application of any legal proposition. One test, which will at any rate help in the consideration of this question, is to inquire whether the person rendering the assistance would probably have done so if the property with which he interfered had had no owner. If he would, there is a strong presump-

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actual employ. And it is clear law that the master would not have been liable if the servant below had been injured by the negligence of the servants above." The contrary decision was made in the Scotch case of *Little v. Summerlee Iron & Coal Co.* (27 Jur. 135; 17 Dunlop, 310; Hay, 207).

tion that he acted only in his own interest. If he would not, it may fairly be presumed that his purpose, however selfish in its ultimate aim, was to render service to the owner.

§ 108. In order to constitute an exception to the general rule of the master's liability for the negligence of his servant, it is necessary that the person suffering the injury should be not only a fellow-servant, but also in the *same common employment*, with the servant whose negligence has caused the injury.<sup>1</sup> This does not mean that the two servants must be engaged in the same kind of work, or even in the same department. It is enough if they are both engaged in serving the same master in the same general business.<sup>2</sup>

§ 109. Servants are engaged in a common employment (for the purposes of the rule now under consideration), when each of them is occupied in service of such a kind that all the others, in the exercise of ordinary sagacity, ought to be able to foresee, when accepting their employment, that it may probably expose them to the risk of injury in case he is negligent. That this is the proper test is evident from the reason assigned for the exemption of masters from liability to their servants, viz., that the servant takes the risk into account in fixing his wages. He cannot take into account a risk which he has no reason to anticipate; and he does take into account those risks which the average experience of his fellows had led them

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<sup>1</sup> Warburton v. Great Western R. Co., Law Rep. 2 Exch. 30; Gillenwater v. Madison & Co. R. Co., 5 Ind. 339; see Abraham v. Reynolds, 5 Hurlst. & N. 143.

<sup>2</sup> Bartonshill Coal Co. v. Reid, 3 Macq. H. L. 266; Bartonshill Coal Co. v. McGuire, Id. 300. "When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department, and what a distinct department of duty" (Farwell v. Boston & Worcester R. Co., 4 Metc. 49).

as a class to anticipate.<sup>1</sup> Thus an engineer upon a railroad is in the same common employment with the conductor and brakemen<sup>2</sup> on his train, with the engineer and conductor on another train,<sup>3</sup> with the switch-tenders on the road, with men employed to repair the machinery,<sup>4</sup> with men employed to couple the cars,<sup>5</sup> and with the station-masters. So a brakeman is in the same common employment with a switchman in the service of the same railroad company,<sup>6</sup> and with an inspector of the machinery and cars;<sup>7</sup> and a man employed upon the track, either to keep it in repair, or to watch for trains, is in the same common employment with the engineer,<sup>8</sup> conductor,<sup>9</sup> and firemen<sup>10</sup> of a train belonging to the company by which he is em-

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<sup>1</sup> In *Bartonshill Coal Co. v. McGuire* (3 Macq. H. L. 300), Lord Chelmsford said: "There may be some nicety and difficulty, in peculiar cases, in deciding whether a common employment exists; but in general, by keeping in view what the servant must have known or expected to have been involved in the service which he undertook, a satisfactory conclusion may be arrived at."

<sup>2</sup> Plaintiff was employed by the defendants to load cars with sand and gravel, and was conveyed to and from his home every day free of charge, it being understood that he was to assist as brakeman; and while coming home, through the negligence of the engineer, he was injured. Held, that the defendant was not responsible (*Russell v. Hudson River R. Co.*, 17 N. Y. 134).

<sup>3</sup> *Farwell v. Boston & Worcester R. Co.*, 4 Metc. 49.

<sup>4</sup> *Hard v. Vermont & Canada R. Co.*, 32 Verm. 473. In that case Pierpoint, J., said: "All who are engaged in accomplishing the ultimate purpose in view, that is, the running of the road, must be regarded as engaged in the same general business within the meaning of the rule."

<sup>5</sup> *Wilson v. Madison & C. R. Co.*, 18 Ind. 226.

<sup>6</sup> *Ponton v. Wilmington & Weldon R. Co.*, 6 Jones [N. C.] 245; *Slattery v. Toledo & Wabash R. Co.*, 23 Ind. 81.

<sup>7</sup> *Columbus & Xenia R. Co. v. Webb*, 12 Ohio St. 475. See *Manville v. Cleveland & Toledo R. Co.*, 11 Ohio St. 417.

<sup>8</sup> *McEniry v. Waterford & Kilkenny R. Co.*, 8 Irish C. L. 312. Plaintiff was employed by the defendant in keeping its track in repair, by following certain trains in a hand-car over a portion of the track, reporting defects, &c. While so doing he was overtaken and run over by a train of defendants, called a stake train, running in the evening without notice or lights. Held, that the defendant was not liable (*Coon v. Syracuse & Utica R. Co.*, 5 N. Y. 492).

<sup>9</sup> *Waller v. Southeastern R. Co.*, 2 Hurlst. & C. 102; see also *Lovegrove v. London, Brighton & C. R. Co.*, 16 C. B. [N. S.] 669.

<sup>10</sup> *Whaalan v. Mad River & C. R. Co.*, 8 Ohio St. 249.

ployed. So men employed in working a mine, though some of them work entirely above ground, and others entirely below ground, are within the rule;<sup>1</sup> and many other examples may be found in the reports.<sup>2</sup> The doctrine has been pushed so far that it appears to be settled in most of the states (Indiana being at present the only exception that can be positively named), that workmen employed by a railroad company upon its track or depots, and carried free to and from their work, upon trains in the management of which they do not in the least degree participate, are in a common employment with the engineer

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<sup>1</sup> The plaintiff's intestate, being then a servant of the defendants, was ascending from a coal mine, in the cradle of a shaft. The motion of the cradle was controlled by an engineer in the service of the defendants. His duties were wholly performed above ground, and were of an entirely different kind from those of the deceased, who worked in the mines. Through the engineer's negligence the cradle was overturned, and the servant was thrown out and killed. Held, that the engineer and the deceased were fellow-servants in a common employment, and therefore that the defendants were not liable (*Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. 266; *Bartonshill Coal Co. v. McGuire*, Id. 300). In the Court of Session, Lord Ivory said: "The position of Shearer (the engineer) does not properly come up to that of a *collaborateur*. There is a superintendence which takes his duties altogether away from common employment with the men below." "This party has such duties as to make him his employer's representative." But in the House of Lords, Lord Cranworth said: "It is not necessary for this purpose that the workman causing and the workman sustaining the injury should both be engaged in performing the same or similar acts. The driver and guard of a stage-coach, the steerman and rowers of a boat, &c., \* \* are all engaged in common work. They are all contributing directly to the common object of their common employer" (Id.) The plaintiff was employed as a servant by the defendants, in a coal mine. Directly over the spot where the plaintiff was at work, was a large stone, which was about ready to fall. The underlooker noticed the fact, and he should have taken measures to prevent the stone falling. This he did not do, and the stone falling sooner than was expected, injured the plaintiff. The defendants were not aware of the condition of the roof of the mine; and it did not appear that they were guilty of negligence in the selection of the underlooker. Held, that the defendants were not liable, as the plaintiff and the underlooker were fellow-servants (*Hall v. Johnson*, 3 Hurlst. & C. 589).

<sup>2</sup> The plaintiff was employed by a railway company, to do carpenter work on their cars. Some porters, also in the service of the company, in shifting a locomotive by means of a turn-table, negligently injured the plaintiff. Held, that the porters and carpenter were fellow-workmen in a common employment (*Morgan v. Vale of Neath R. Co.*, 5 Best & Smith, 570; affirmed, Id. 740; Law Rep. 1 Q. B. 149). Blackburn, J., said, and Erle, C. J., repeated his language with approval on the appeal: "There are many cases where the immediate object on which the one servant is employed is

and other servants in charge of the train,<sup>1</sup> and with switchmen upon the track,<sup>2</sup> and therefore that the company is not liable to the former class of servants for the negligent management of the train by the latter. A distinction has been made in Pennsylvania, in favor of a servant who accepts reduced wages in consideration of being allowed to travel upon the road to and from his work.<sup>3</sup>

§ 110. On the other hand, the mere fact that two servants of the same man are both engaged in adding to his wealth, or ministering to his tastes or comforts, does not necessarily bring them within the definition of a common employment. Thus, where a merchant carries on a regular trade in his store, and at the same time owns a ship, the clerks in his store and the sailors in his ship are clearly not in a common employment. Still less are domestic servants, engaged in providing for the wants of their employer at home, in a common employment with his clerks, operatives, or other servants in his business.

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very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages" (Ib.)

<sup>1</sup> *Boldt v. N. Y. Central R. Co.*, 18 N. Y. 432; *Ryan v. Cumberland Valley R. Co.*, 23 Penn. St. 384; *Gillshannon v. Stony Brook R. Co.*, 10 Cush. 228; *Seaver v. Boston & Maine R. Co.*, 14 Gray, 466; *Whaalan v. Mad River &c. R. Co.*, 8 Ohio St. 249. But in Indiana, where a servant was employed to construct a bridge, and, by direction of his master, went, without paying fare, in a train under the control of other servants of the same master, to procure lumber for the bridge, and he was injured by the negligent management of the train, it was held he was a passenger and not a fellow-servant, and therefore that the master was liable (*Gillenwater v. Madison &c. R. Co.*, 5 Ind. 339). So where the plaintiff was employed to ballast the defendant's road, and was conveyed to and from his work on the defendant's cars, it was held, that the defendant was liable for an injury suffered by the plaintiff through the negligence of the engineer in charge of the train (*Fitzpatrick v. New Albany &c. R. Co.*, 7 Ind. 436).

<sup>2</sup> *Gilman v. Eastern R. Co.*, 10 Allen, 233; *Tunney v. Midland R. Co.*, Law Rep. 1 C. P. 291.

<sup>3</sup> *O'Donnell v. Allegheny Valley R. Co.*, 59 Penn. St. 239.



## CHAPTER VII.

### LIABILITY OF SERVANTS TO THIRD PERSONS.

- Sec. 111. Servant not liable to third person for breach of contract.
- 112. Servant liable for tortious negligence.
- 113. The liability of shipmasters.
- 114. Servant not liable for negligence of a fellow-servant.
- 115. Joint liability of master and servant.

§ 111. No agent of a private individual or corporation, except the master of a vessel, is ever liable to third persons for his failure to perform the obligations of his principal. He is, consequently, not responsible to them for any negligence in the performance of duties devolving upon him purely from his agency; since he cannot, *as agent*, be subject to any obligations toward third persons, other than those of his principal. And these duties are not imposed upon him by law, nor has he agreed with any one, except his principal, that he will perform them. In failing to do so, he wrongs no one except his principal, who alone, therefore, can hold him responsible for his negligence.<sup>1</sup> For the failure of the agent to perform any duty which the principal owes to a third person, the remedy of such person is only against the principal, even though the fault, as a matter of fact, is entirely with the agent. Thus, where a banker is employed to collect a note, which he puts into the hands of another banker, through whose negligence the debt is lost, the creditor cannot sue the latter banker, though he was the one actually in fault.<sup>2</sup> So

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<sup>1</sup> *Montgomery Bank v. Albany Bank*, 7 N. Y. 459; *Colvin v. Holbrook*, 2 N. Y. 126; *Denny v. Manhattan Co.*, 2 Denio, 115; affirmed, 5 Id. 639; *Bristol &c. R. Co. v. Collins*, 7 H. L. Cas. 194; 5 Hurlst. & N. [Amer. ed.] 969; *Coxon v. Gt. Western R. Co.*, 5 Hurlst. & N. 274; *Mytton v. Midland R. Co.*, 4 Id. 615; see *Anderson v. Brownlee*, 1 S. 474; Hay, 28; see *Blackstock v. N. Y. & Erie R. Co.*, 20 N. Y. 48, 50; *Henshaw v. Noble*, 7 Ohio St. 226.

<sup>2</sup> *Montgomery Bank v. Albany Bank*, 7 N. Y. 459; see *Commercial Bank v. Union Bank*, 11 N. Y. 203.

the transfer agent of a corporation is not liable to a purchaser of stock for his improper refusal to transfer such stock upon the books.<sup>1</sup> So a sheriff's deputy is not liable to a judgment-creditor for money collected by him under an execution in favor of the creditor.<sup>2</sup> So the agent of an executrix is not liable to the legatees for his mismanagement of the estate.<sup>3</sup>

§ 112. But every one, whether he is principal or agent, is responsible directly to persons injured by his own negligence in fulfilling obligations resting upon him in his individual character. These obligations are those which the law imposes upon all persons, independent of contract. No man increases or diminishes his obligations to strangers by becoming an agent; but if in the course of his agency he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either, by his negligence in respect to duties imposed by law upon him, in common with all other men.<sup>4</sup>

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<sup>1</sup> Denny v. Manhattan Co., 2 Denio, 115; affirmed, 5 Id. 639.

<sup>2</sup> Colvin v. Holbrook, 2 N. Y. 126; Tuttle v. Love, 7 Johns. 470.

<sup>3</sup> Phinney v. Phinney, 17 How. Pr. 197.

<sup>4</sup> The common rule, that "the principal, not the deputy, must be sued," refers to an action on contract. "A servant or deputy *quatenus* such cannot be charged for neglect, but the principal only shall be liable; though for a misfeasance an action lies against a servant or deputy, not *quatenus* a deputy or servant, but as a wrong-doer" (12 Mod. 483). An agent is liable for misfeasance to the owner of the property injured, whether he acted by the direction of his principal or not (Richardson v. Kimball, 28 Maine, 463). If one person commit an unlawful act under the direction of another, that fact will not shield him from responsibility, but both are equally liable to the injured party (Johnson v. Barber, 5 Gilm. 425). An agent, committing a positive and obvious wrong, cannot relieve himself from liability by showing that he was acting under the orders of another (see Bennett v. Ives, 30 Conn. 329; Mitchell v. Harmony, 13 How. [U. S.] 115). One who superintends gratuitously work done on the land of another, and through whose negligence, as well as that of such other, damage is done to a third person by the work, is liable jointly with the other person therefor (Hawthornthwaite v. Thompson, 98 Mass. 77). In applying this principle, it must be borne in mind that a rule of law is merged in a contract, express or implied, covering the same point. Therefore, one who commits his property to the care of another, for any purpose, enters into an implied contract with the latter for the exercise of care, which supersedes the requirement of the law. And the agents of the

Thus, a servant is personally liable to a third person for negligently driving the master's horse or carriage over him, even though the master also be liable.<sup>1</sup> So the driver of a railroad engine, or the conductor of a train, is personally responsible for cattle killed on the track through his negligence,<sup>2</sup> or for bodily injuries suffered by a passenger from the same cause.<sup>3</sup> And, although the contrary doctrine is established in Massachusetts,<sup>4</sup> we are satisfied that the weight of reason and authority is in favor of holding a servant liable to his fellow-servants for injuries suffered by them through his personal negligence. Servants do not necessarily or commonly make any bargain with each other, express or implied, for exemption from such liability; and if it is true that they consider the risk in fixing their wages, the implied contract thus entered into is not made for the benefit of the other servants, nor have the latter any interest in it.

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person thus entrusted, in dealing with the property as such agents, and within the scope of their agency, are not subject to the general rule of law requiring care, for that has been merged in the contract; nor are they subject to the contract, for they were not parties to it.

<sup>1</sup> *Phelps v. Wait*, 30 N. Y. 78; *Montfort v. Hughes*, 3 E. D. Smith, 591; *Wright v. Wilcox*, 19 Wend. 343; *Hewett v. Swift*, 3 Allen, 420; but compare *Parsons v. Winchell*, 5 Cush. 592.

<sup>2</sup> *Suydam v. Moore*, 8 Barb. 358.

<sup>3</sup> Where an engineer is employed to erect a steam boiler and other apparatus, and, in consequence of the explosion of the boiler, while under the personal supervision of the engineer, although, from the insufficiency of the materials of which it was composed, the plaintiff is injured, the engineer is answerable. But it seems that if the jury had negatived the fact of the defendant's management of the apparatus, he would not have been primarily liable (*Witte v. Hague*, 2 Dowl. & R. 33).

<sup>4</sup> *Albro v. Jaquith*, 4 Gray, 99. It was there held that one servant is not liable to another, while in the employment of the same master, for injuries occasioned by the negligence of the first in such employment. Merrick, J., said, in that case: "Many of the considerations of justice and policy, which led to the adoption of the general rule now perfectly well established, that a party who employs several persons in the conduct of some common enterprise or undertaking, is not responsible to any one of them for the injurious consequences of the mere negligence or carelessness of the others in the performance of their respective duties, have an equal significance and force when applied to actions brought for like causes by one servant against

§ 113. By a rule peculiar to the mercantile law, the master of a private vessel, no matter of what kind,<sup>1</sup> is responsible to third persons for his own negligence to the fullest extent,<sup>2</sup> and for the negligence of all employed on board to the same extent as if he were the ultimate principal.<sup>3</sup> His liability in this last respect is defined in the chapter on the liability of masters for the acts of their servants. But while the master is on shore, and the vessel is under the charge of a licensed pilot, the latter is master for the time being, and the former is not liable for the pilot's negligence.<sup>4</sup>

§ 114. Except in the peculiar case mentioned in the last section, a servant is never responsible to a third person for the negligence or other fault of a fellow-servant, even though the latter is under the control and direction of the former, as the sole representative of the master, having the power to select and dismiss his subordinate fellow-servants.<sup>5</sup> It is only for his own personal negligence that a servant is liable.

another. In the latter, as in the former case, they are presumed to understand and appreciate the ordinary risk and peril incident to the service in which they are to be employed, and to predicate the compensation they are to receive, in some measure, upon the extent of the hazard they assume." There is a *dictum* of Pollock, C. B., to the same effect (*Southcote v. Stanley*, 1 Hurlst. & N. 247).

<sup>1</sup> Not only does this rule apply to the master of a merchant ship, but also to the master of a steamer carrying passengers on inland waters (*Denison v. Seymour*, 9 Wend. 9). The relation of master and servant does not subsist between the captain of a ship of war and his officers or seamen (*Nicholson v. Mounsey*, 15 East, 384); nor between the master or owner of a merchant vessel and a pilot received on board under a statute giving the former no choice to accept or refuse, nor control over his services (see *Bowcher v. Noidstrom*, 1 Taunt. 568).

<sup>2</sup> *Denison v. Seymour*, 9 Wend. 9; see *Foot v. Wiswall*, 14 Johns. 304; *Snell v. Rich*, 1 Johns. 305; *Rosiére v. Sawkins*, 12 Mod. 434.

<sup>3</sup> *Ib.*

<sup>4</sup> *Snell v. Rich*, 1 Johns. 305.

<sup>5</sup> The defendant was employed as the general superintendent over a job of quarrying and mason-work, and as such directed another servant of the same master to take charge of the blasting of certain rocks. The latter servant, in the absence of the defendant, and by his own negligence alone, caused an injury to a third person in the

§ 115. Wherever a master can be held responsible for the tortious negligence of his servant, the two are jointly as well as severally liable;<sup>1</sup> and if a servant employs a sub-agent, under such circumstances that both the original master and the intermediate employer are liable for the negligence of the sub-agent, they are all jointly and severally liable.<sup>2</sup>

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process of blasting. Held, that the defendant was not liable for the injury. Davis, J., said: "Neither principle nor authority will warrant the holding a mere middle-man, an intermediate agent between the master and the direct agent, constructively, responsible for the acts of the latter" (*Brown v. Lent*, 20 Verm. 529).

<sup>1</sup> *Phelps v. Wait*, 30 N. Y. 78; *Suydam v. Moore*, 8 Barb. 358; *Montfort v. Hughes*, 3 E. D. Smith, 591; *Wright v. Wilcox*, 19 Wend. 343; *Hewett v. Swift*, 3 Allen, 420. The contrary doctrine appears to prevail in Massachusetts. It has been there held that a master and servant are not liable jointly, in an action on the case, for an injury occasioned by the negligence of the servant while driving the carriage of the master in his absence (*Parsons v. Winchell*, 5 Cush. 592; and see *Campbell v. Phelps*, 1 Pick. 62).

<sup>2</sup> *Suydam v. Moore*, 8 Barb. 358.

## CHAPTER VIII.

### MUNICIPAL CORPORATIONS.

- SEC. 116. Nature and origin of corporations generally.  
117. Different kinds of corporations classified.  
118. Quasi corporations and their liabilities.  
119. Liability of corporations generally for torts.  
120. Public and private functions of municipal bodies.  
121. True theory of municipal government.  
122. Power of the legislature to impose corporate obligations.  
123. Breach of public duty actionable, when.  
124. The statute the criterion of corporate duty.  
125. Statutory requirements, quasi contracts.  
126. Question of construction arising in each case.  
127. Negligence not predicable of discretionary duties.  
128. Illustrations of discretionary duties.  
129. Lawful and skillful exercise of discretion not actionable.  
130. Rule as against the state.  
131. Liability for breach of imperative duty.  
132. Duty arising from prescription.  
133. Absolute character of the obligation.  
134. The cases classified.  
135. Negligence of its agents imputable to corporation.  
136. Liability for omissions of duty by agents.  
137. Liability for wrongful acts of agents.  
138. Not liable for acts of independent officers.  
139. Not liable for acts of departmental officers.  
140. Not liable for wrongful acts of officers though *colore officii*.  
141. Liability for acts of subordinates and sub-agents.  
142. Not liable for acts of independent contractors.  
143. Construction and maintenance of public works.  
144. Rule as to construction of public works.  
145. Statutory directions to be strictly followed.  
146. Maintenance and repair of streets, &c.  
147. Negligence must be affirmatively shown.  
148. Notice of defect, when necessary.  
149. The general rule stated.  
150. Rule applies to public works generally.  
151. Liability for obstruction of sewers.  
152. Negligent use of public property.  
153. Not liable for breach of police regulations.  
154. Remedy over against wrong-doers.  
155. Want of funds is no excuse for negligence.

§ 116. A corporation is an artificial being, having certain powers and duties of a natural person, but existing only in contemplation of law.<sup>1</sup> In England, corporations may exist by implication, by prescription, or by the express or implied grant of the king. But in America, corporations are created solely by the authority of the legislature, and they have no powers except those given by the act of incorporation, either expressly or as incidental to their existence or their express powers.<sup>2</sup> Doubtless, however, corporations may exist in this country by prescription, yet, as is said, this presupposes and is evidence of a grant, when the acts and proceedings on which the presumption is founded could not have lawfully proceeded from any other source.<sup>3</sup>

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<sup>1</sup> Per Marshall, C. J., *Dartmouth College v. Woodward*, 4 Wheat. 626. A corporation is defined by Judge Bouvier to be "an intellectual body politic, created by law, composed of one or more persons, who act under a common name, are endowed with perpetual succession, and with various other powers, by its charter or law creating it, and which for certain purposes is considered as a natural person" (1 Bouv. Inst. 73, § 178).

<sup>2</sup> *Beatty v. Knowler*, 4 Peters, 152; affirming S. C., 1 McLean, 41; *Perine v. Ches. & Del. Canal Co.*, 9 How. [U. S.] 172; *Head v. Providence Ins. Co.*, 2 Cranch, 127; *Dartmouth College v. Woodward*, 4 Wheat. 636. In the last case, Chief Justice Marshall remarked of a corporation: "Being the mere creature of the law, it possesses only these properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created" (See also *State v. Stebbins*, 1 Stewart [Ala.] 299; *Beatty v. Marine Ins. Co.*, 2 Johns. 109; *N. Y. Firemen Ins. Co. v. Sturges*, 2 Cow. 664, 675; *Fuller v. Plainfield Academic School*, 6 Conn. 532; *Gozzler v. Georgetown*, 6 Wheat. 597; *Dawes v. North River Ins. Co.*, 7 Cow. 462). "Towns, like other corporations, can exercise no powers except such as are expressly granted to them, or such as are necessary to enable them to discharge their duties, and carry into effect the object and purposes of their creation" (*Abendroth v. Greenwich*, 29 Conn. 363; *S. P., Willard v. Killingworth*, 8 Id. 254; *Booth v. Woodbury*, 32 Conn. 118; *Morey v. Newfane*, 8 Barb. 645). Corporate powers cannot be created by implication, nor extended by construction (*Pennsylvania R. Co. v. Canal Commissioners*, 21 Penn. St. 9; *Wright v. Briggs*, 2 Hill, 77; *Macon v. Macon & Western R. Co.*, 7 Geo. 221; and see *Blair v. Perpetual Ins. Co.*, 10 Mo. 559; *Hosack v. College of Physicians*, 5 Wend. 547; *Brady v. Mayor &c. of N. Y.*, 20 N. Y. 312).

<sup>3</sup> 2 Kent Comm. 277, citing *Dillingham v. Snow*, 3 Mass. 276; *Stockbridge v. West Stockbridge*, 12 Id. 400; *Hagerstown Turnp. Co. v. Creeger*, 5 Harr. & Johns. 122; *Green v. Dennis*, 6 Conn. 302. Corporations created in this country by the king of Great Britain previous to the Revolution are equally within the protection of

§ 117. Corporations are sometimes distinguished as being either public or private : the former being those which have for their object the government of a portion of the state, such as counties, towns, cities, and the like,<sup>1</sup> while the latter have for their object the emolument of their members or the advancement of a particular interest. Public corporations are again classified into political and non-political corporations, with which latter we have no concern.<sup>2</sup>

§ 118. There is a marked distinction to be made between that class of public political corporations commonly called municipal corporations, and such organizations as towns, townships, counties, parishes, hundreds, and other political divisions of the state, which are established without any express charter or act of incorporation, with limited powers, and which are restrained from a general use of authority. These divisions of the state are called *quasi* corporations. The body they compose is recognized by statute or

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the constitution with those created by the different states (*Dartmouth College v. Woodward*, 4 Wheat. 518; *Society for the Propagation of the Gospel v. New Haven*, 8 Id. 464; *Terrett v. Taylor*, 9 Cranch, 43; see *Vermont v. Society for the Propagation of the Gospel*, 1 Paine, 652).

<sup>1</sup> Even the United States may be said to be a corporation (*United States v. Hillegas*, 3 Wash. C. C. 73), as the king of England and Parliament are (10 Co. 29 b. Shep. Abr. 431). And so the several states of the Union are corporations (*Indiana v. Woram*, 6 Hill, 33).

<sup>2</sup> A corporation—*e. g.*, a bank—created for the use of the government alone, there being no other stockholder, is a public though not a political corporation. If any private individual holds a part of the stock, it will be a private corporation (*Bank of the United States v. Planters' Bank of Georgia*, 9 Wheat, 904; *Tinsman v. Belvidere & Delaware R. Co.*, 2 Dutch. 148). By becoming a partner in such a company, the government divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it takes the character which belongs to its associates and to the business which is to be transacted (*Bank of United States v. Planters' Bank of Georgia*, 9 Wheat, 904; *Pennsylvania v. Wheeling & C. Bridge*, 13 How. [U. S.] 518, 560). The fact that a state is the sole owner of the stock will not affect the rights of the corporation's creditors (*Curran v. Arkansas*, 15 How. [U. S.] 304; reversing *S. C.*, 7 Eng. [Ark.] 321).



by immemorial usage, and they have limited powers and duties which may be enforced, and privileges which may be maintained,<sup>1</sup> but they are invested with corporate powers *sub modo*, and for a few specified purposes only.<sup>2</sup> Highway commissioners, superintendents of common schools, county supervisors, overseers of the poor, and the like, may also be classed among *quasi* corporations.<sup>3</sup> In New York, towns and counties are at most *quasi* corporations.<sup>4</sup> It is a general rule that no action can be maintained against corporations of this class, by a private person, for their neglect of duty, unless such right of action is created by statute.<sup>5</sup> They have no common law liabilities.

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<sup>1</sup> Gibson, C. J., *Commonwealth v. Green*, 4 Wheat. 531.

<sup>2</sup> 1 Bouv. Inst. 77, § 185; Angell on Corp. § 6, 23; 2 Kent Comm. 278; *North Hempstead v. Hempstead*, Hopk. Ch. 288; *Jackson v. Hartwell*, 8 Johns. 422; *Hornbeck v. Westbrook*, 9 Id. 73.

<sup>3</sup> *Court v. Coroner*, 2 Wallace, 501; *Commissioners of Roads v. McPherson*, 1 Speer [S. C.] 218; *Carmichael v. Trustees &c.*, 3 How. [Miss.] 84; *Trustees &c. v. Tatnam*, 13 Ill. 27; *Governor v. Gridley*, Walker [Miss.] 328; *Keuren v. Johnson*, 3 Den. 183; *Grant v. Fancher*, 5 Cow. 309; *Todd v. Birdsall*, 1 Cow. 260.

<sup>4</sup> *Purdy v. People*, 4 Hill, 284, 395, per Paige, Senator. See *Jackson v. Hartwell*, 8 Johns. 330; 18 Id. 422; *Denton v. Jackson*, 2 Johns. Ch. 325; *Todd v. Birdsall*, 1 Cow. 260; *Grant v. Fancher*, 5 Id. 309; *North Hempstead v. Hempstead*, 2 Wend. 109; *Jackson v. Cory*, 8 Johns. 385; *Hornbeck v. Westbrook*, 9 Id. 73.

<sup>5</sup> *Riddle v. Proprietors of Locks &c.*, 7 Mass. 169; *Merchants' Bank v. Cook*, 4 Pick. 414; *Morey v. Newfane*, 8 Barb. 645; *Adams v. Wiscasset Bank*, 1 Greenl. 361; *Chidsey v. Canton*, 17 Conn. 475; *Chase v. Merrimack Bank*, 19 Pick. 569; *Gaskell v. Dudley*, 6 Metc. 546; *Commonwealth v. Springfield*, 7 Mass. 9; *Davis v. Maynard*, 9 Mass. 242; *Mower v. Leicester*, 9 Mass. 247; *Sawyer v. Northfield*, 7 Cush. 494; *Barry v. Lowell*, 8 Allen, 127; *Brady v. Lowell*, 3 Cush. 121; *Mitchell v. Rockland*, 52 Maine, 118; *Hafford v. New Bedford*, 16 Gray; *Walcott v. Swampscott*, 1 Allen, 101; *Farnum v. Concord*, 2 N. H. 392; *Baxter v. Winooski Turnpike Co.*, 27 Verm. 123. A town, which has assumed the duties of school districts, is not liable, in the absence of statutory obligation, for an injury to a scholar attending the public school, from a dangerous excavation in the school-house yard, owing to the negligence of the town officers (*Bigelow v. Randolph*, 14 Gray, 541; see *Eastman v. Meredith*, 36 N. H. 284; *Jones v. New Haven*, 34 Conn. 1). In Louisiana no remedy is given by statute against a parish for a private injury caused by the absence of bridges, or a neglect to keep them in repair (*King v. St. Landry*, 12 La. Ann. 858). And where it was not shown that the parish was under a legal obligation to keep the bridge over a certain water-course always in repair, it was held not to be liable for damages occasioned by the ruinous condition of the bridge (*Ib.*) In California, a *county*, being a *quasi* corporation, is not liable for damages sustained by reason of the unskillful treat-

§ 119. The great object of incorporation is to bestow the character and properties of individuality on a collective and changing body of men. In law, a corporation is a person; and any privileges which may exempt it from the burdens common to individuals must be expressed in its charter, or they do not exist; they do not flow necessarily from the charter.<sup>1</sup> Although incapable of commit-

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ment of an indigent sick person in the county hospital by the resident physician, nor by reason of insufficient and unwholesome food and other necessities there supplied to the patient (*Sherbourne v. Yuba*, 21 Cal. 113). A county is not a person in any sense; it is not a corporation. It cannot sue or be sued, except where specially permitted by statute, and such permission can be withdrawn or denied at any time the Legislature may think proper (*Hunsaker v. Borden*, 5 Cal. 288; *Price v. Sacramento*, 6 Id. 254; *Hoffman v. St. Joaquin*, 21 Id. 426; *Commissioners &c. v. Martin*, 4 Mich. 557; *Larkin v. Saginaw*, 11 Mich. 88; *Hamilton County v. Mighels*, 7 Ohio St. 109; *Haygood v. Justices &c.*, 20 Geo. 845; *Carroll v. Board of Police*, 28 Miss. 38; *Reardon v. St. Louis County*, 36 Mo. 555; see § 248, *post*. A town incorporated by an unconstitutional act has no legal existence as a corporation, and a judgment against it is a mere nullity (*Colton v. Rossi*, 9 Cal. 595). In New York an action will not lie against a town to recover a claim arising upon contract. Parties who contract to render services for either a town or county do it with a knowledge that their remedy to procure payment is through the action of the board of supervisors. Where that body neglect or refuse to discharge a duty fairly imposed by law, performance will be compelled by *mandamus* (*Bell v. Esopus*, 49 Barb. 506). But in Tennessee, a town corporation is liable to indictment at common law for not keeping the streets in repair (*State v. Murfreesboro*, 11 Humph. 217; see *State v. Loudon*, 3 Head, 263). And in New Hampshire it is held that incorporated towns are bound to keep in repair the highways within their limits, and for neglect of such duty they are liable at common law, and independently of the statute giving an action (*Wheeler v. Troy*, 20 N. H. 77; and see *Pike County v. Hosford*, 11 Ill. 170; *Adams v. Logan County*, Ib. 336). If the statute gives a suit against such a community, it having no corporate fund, each inhabitant is liable to satisfy a judgment against it (*Russell v. Men of Devon*, 2 T. R. 667), but in the absence of such a statute, the inhabitants of a country are not liable to a suit at common law (Id.; see *McKimson v. Penson*, 8 Exch. 319; 9 Id. 609). In *Beardsley v. Smith* (16 Conn. 368), it was shown to be the immemorial usage, and uniformly supported by judicial decisions throughout New England, that the inhabitants of towns and other municipal communities or corporations and quasi corporations, were liable in their persons and property for the debts of the towns or corporations by taxation or execution. As to liabilities of highway commissioners, see *Garlinghouse v. Jacobs*, 29 N. Y. 297; *People v. Hudson*, 7 Wend. 474; *People v. Adsit*, 2 Hill, 619; *Barker v. Loomis*, 6 Id. 463; *Bartlett v. Crozier*, 17 Johns. 438, 451; *Shepherd v. Lincoln*, 17 Wend. 250. See also the chapters on HIGHWAYS and PUBLIC OFFICERS.

<sup>1</sup> *Providence Bank v. Billings*, 4 Peters, 514, 560. A corporation is to be deemed a "person" within the meaning of that term as used in the usury laws (*Thornton v. Bank of Washington*, 3 Pet. 36, 42); or as used in a treaty clause against confiscations

ting a crime,<sup>1</sup> or, indeed, of doing any personal act, it is, like a natural person, subject to those fundamental principles of law established by a long line of judicial determinations, the faithful application of which insures the permanent security and well-being of society. Its very existence involves the necessity of officers and agents, by whom alone it acts, or neglects to act. In matters of tort, as well as in matters of contract, the acts of such agents are regarded as the acts of the corporate body. It has, therefore, been long settled that a corporation is liable in actions *ex delicto*, such as trespass, trover, and trespass upon the case, for torts commanded or authorized by it.<sup>2</sup>

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and prosecutions against any persons (Society for the Propagation of the Gospel v. New Haven, 8 Wheat. 464). A corporation is to be so deemed also within the purview of penal statutes as well as for civil purposes (United States v. Amedy, 8 Wheat. 392; compare Dean &c. of Bristol v. Clark, 1 Dyer, 83 b.; Cortes v. Kent Waterworks Co., 7 Barn. & C. 314; Boyd v. Croydon R. Co., 4 Bing. [N. C.] 669; Attorney-General v. Newcastle, 5 Beav. 307). So it is deemed to be a citizen (Louisville &c. R. Co. v. Letson, 2 How. [U. S.] 497; compare Lafayette Ins. Co. v. French, 18 Id. 404; Bellona Co. Case, 3 Bland Ch. 422). In N. Y. & New Haven R. Co. v. Schuyler (34 N. Y. 30), Davis, J., stated the general rule to be, that "a corporation is liable to the same extent, and under the same circumstances as a natural person for the consequences of its wrongful acts, and will be held to respond in a civil action at the suit of an injured party, for every grade and description of forcible, malicious, or negligent tort or wrong which it commits, however foreign to its nature, or beyond its granted powers, the wrongful transaction or act may be" In an action against the corporation of New York city, the corporation was held to be "a person living" within the language of § 399 of the Code of Procedure of New York, which authorizes the examination of a party on his own behalf conditionally, if the adverse party or person be living (Wallace v. Mayor &c. of N. Y., 2 Hilt. 440; S. C. 9 Abb. Pr. 40; see People v. May, 27 Barb. 238). And see as to competency of corporations as witnesses, Van Wormer v. Mayor &c. of Albany, 15 Wend. 262; Watertown v. Cowen, 4 Paige, 510; Ex parte Kip, 1 Id. 613; Falls v. Belknap, 1 Johns. 486; Corwin v. Haines, 11 Id. 76; Bloodgood v. Jamaica, 12 Id. 285.

<sup>1</sup> Its officers committing a misdemeanor while acting in its behalf are personally and exclusively liable (Commonwealth v. Swift Run Turnp. Co., 2 Va. Cas. 362; 1 Bouv. Inst. 81; Angell on Corp. § 7).

<sup>2</sup> Hawkins v. Dutchess &c. Steamboat Co., 2 Wend. 452; Life & Fire Ins. Co. v. Mechanic Fire Ins. Co., 7 Id. 31; Albert v. Savings Bank, 2 Md. Dec. 169; Goodspeed v. East Haddam Bank, 22 Conn. 541; McCready v. Guardians of the Poor, 9 Serg. & R. 94; Lyman v. White River Bridge Co., 2 Aik. 252; Goodloe v. Cincinnati, 4 Ham. 500, 514; Hamilton Co. v. Cincinnati &c. Turnpike Co., Wright [Ohio], 603; Chest-

§ 120. There is nothing in the character of a municipal corporation which entitles it to an immunity from liability for such malfeasances as private corporations or individuals would be liable for in a civil action.<sup>1</sup> A municipal corporation is liable to the same extent as an individual for any act done by the express authority of the corporation, or of a branch of its government, empowered to act for it upon the subject to which the particular act relates, and for any act which, after it has been done, has been lawfully ratified by the corporation.<sup>2</sup> While this doctrine has

*nut Hill Turnpike v. Rutter*, 4 Serg. & R. 16; *Kneass v. Schuylkill Bank*, 4 Wash. C. C. 106; *Riddle v. Proprietors of Locks and Canals*, 7 Mass 187; *Beach v. Fulton Bank*, 7 Cow. 485; *York & Maryland R. Co. v. Winans*, 17 How. [U. S.] 30; *Phil. & Balt. R. Co. v. Quigly*, 21 Id. 209; *Yarborough v. Bank of England*, 16 East, 6; *Watson v. Bennett*, 12 Barb. 196; *President &c. v. Wright*, 5 Ind. 252; *Dater v. Troy Turnp. and R. Co.*, 2 Hill, 629; *Maund v. Monmouthsh. Canal &c.*, 4 Man. & G. 452; *Edwards v. Union Bank*, 1 Branch, 136; *Bissell v. Mich. So. & N. Ind. R. Co.*, 22 N. Y. 305; *Frankfort Bank v. Johnson*, 24 Maine, 490; *Greene v. London Omnibus Co.*, 7 C. B. [N. S.] 290. Where the walls of a church edifice belonging to a religious corporation were negligently permitted to stand after the rest of the building had been destroyed by fire, and a part of the wall afterward fell upon a person while passing along the street,—held, that the corporation were liable to respond in damages for the injury (*Church of the Ascension v. Buckhart*, 3 Hill, 193). It has been held that a corporation may be sued for an assault and battery committed by their servant acting under their authority (*Moore v. Fitchburg*, 4 Gray, 465; but see *Buttrick v. Lowell*, 1 Allen, 172). So a corporation is liable for the publication of a libel authorized by the corporate body (*Philadelphia &c. R. Co. v. Quigley*, 21 How. [U. S.] 202; see *Townshend on Slander and Libel*, § 265). But an authority given by the officers of a municipal corporation to one of its servants to commit a positive trespass is *ultra vires*, and such corporation cannot be liable for trespasses committed by its servants, even though under color of authority (*Hanvey v. Rochester*, 35 Barb. 177. But see *N. Y. & New Haven R. Co v. Schuyler*, 34 N. Y. 30).

<sup>1</sup> *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; *Lacour v. Mayor &c. of New York*, 3 Duer, 406; *Mayor of Lynn v. Turner*, 1 Cowp. 86; *Henley v. Lyme Regis*, 5 Bing. 91; 1 Bing. N. C. 222. See § 124, *post*.

<sup>2</sup> *Thayer v. Boston*, 19 Pick. 511; *Dayton v. Pease*, 4 Ohio St. 80. In the last case, *Ranney, J.*, said: "When a municipal corporation undertakes to execute its own prescribed regulations, by constructing improvements for the especial interest or advantage of its own inhabitants, the authorities are all agreed that it is to be treated merely as a legal individual, and, as such, owing all the duties to private persons, and subject to all the liabilities that pertain to private corporations or individual citizens. To this class most clearly belongs the construction, repair, and maintenance of its streets. Nor does this conclusion give the least countenance to the supposition that the corporation is liable for the misconduct of the officers it selects, when performing

been universally adopted, an attempt has been made to invest municipal corporations, so far as they exercise their powers exclusively for the public benefit, with the character of sovereignty, and thus to limit their liability for a misuse of their powers to such powers only as have been conferred upon them for their private benefit and advantage. This distinction has given rise to the doctrine that, in determining the rights and liabilities of a municipal corporation, regard should be had not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them, that if granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character, while, on the other hand, if the grant was for the purposes of private advantage and emolument, though the public might derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company, standing upon the same footing as would any individual or body of persons upon whom the like spe-

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duties for or between private individuals. In such cases, the whole duty of the corporation is performed when the selection is made, and, having no interest in, or control over, the performance of such services, no liability attaches." See also *Fowle v. Alexandria*, 3 Peters, 409; *Clark v. Washington*, 12 Wheat. 40; *Goodloe v. Cincinnati*, 4 Ohio, 500; *Smith v. Cincinnati*, Id. 514; *Western v. Brooklyn*, 23 Wend. 334; *McCullough v. Brooklyn*, Id. 458; *Bailey v. Mayor &c. of New York*, 3 Hill, 538; 2 Denio, 450; *Mayor &c. of New York v. Furze*, 3 Hill, 612; *Wilson v. Mayor &c. of New York*, 1 Denio, 595; *Boom v. Utica*, 2 Barb. 104; *Brower v. Mayor &c. of New York*, 3 Id. 254; *Delmonico v. Mayor &c. of New York*, 1 Sandf. 222; *Lloyd v. Mayor &c. of New York*, 5 N. Y. 369; *Storrs v. Utica*, 17 Id. 105; *Hutson v. Mayor &c. of New York*, 9 Id. 163; *Pack v. Mayor &c. of New York*, 8 Id. 222; *Ross v. City of Madison*, 1 Ind. 281; *Cotes v. Davenport*, 9 Iowa, 227; *Barton v. Syracuse*, 37 Barb. 292; *McGinity v. Mayor &c. of New York*, 5 Duer, 674; *Fennimore v. New Orleans*, 20 La. Ann. 124; *Statę v. New Orleans*, Ib. 172. An action of tort lies against a city by the owner of land through which its agents have unlawfully made a sewer (*Hildreth v. Lowell*, 11 Gray, 345; but see *Flagg v. Worcester*, 13 Gray, 601). That a municipal corporation, which creates a private nuisance, is *prima facie* liable for its continuance, see *Pennoyer v. Saginaw*, 8 Mich. 534. In *Holliday v. St. Leonards* (11 C. B. [N. S.] 192), the court held that there was an exception from the general law making a master liable for the negligence of his servant, where the servant is employed by a public body; but this doctrine was limited in the later case of *Mersey Docks Trustees v. Gibbs* (Law Rep. 1 H. L. 93, 119).

cial franchises had been conferred (who would, of course, be liable for their neglect<sup>1</sup>); while, in the former case, the corporation would be exempt from liability.<sup>2</sup> And it was admitted that a public corporation, receiving tolls, not for its own use and behoof, but in a fiduciary way for the maintenance of a public work—such, for instance, as public piers, aqueducts, and the like, was also responsible for negligence in the management of that work. But these distinctions are now entirely repudiated; and it is held

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<sup>1</sup> Lancaster Canal Co. v. Parnaby, 11 Ad. & El. 223. The court say: "The common law, in such a case, imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate it without danger to their lives or property."

<sup>2</sup> This distinction was clearly stated by Nelson, C. J., in *Bailey v. Mayor &c. of New York*, in 1842 (3 Hill, 531), and upon it was based the decision of the court. The action was brought to recover damages against the city of New York for an injury to the plaintiff's land in Westchester county, occasioned by the breaking away of a dam across the Croton river, which had been erected by certain officers called Water Commissioners, under whose directions the work of introducing water into the city had been conducted. The allegation was, that the dam had been unskillfully built. The legal question was, whether the city was so connected with the work as to be liable for the wrong. The Commissioners were appointed by an act of the Legislature to report a plan of the work. This was to be submitted to the Common Council, and also to the electors of the city, for their approval or rejection. It was approved, and the enterprise, which included the building of this dam, was then carried on by the legislative commissioners, pursuant to the statute, under the direction of the Common Council. At the circuit, the judge held that the action could not be sustained against the city, and non-suited the plaintiff. The Supreme Court set aside the non-suit, and held that the defendants were to be regarded, in respect to this work, as a private company, like a bank or railroad corporation, and, consequently, that the corporation was liable for the interference of the water commissioners. On a new trial, a verdict was rendered against the defendants, and the case was presented to the Court of Errors, where the judgment was affirmed. But this distinction was not adverted to by the appellate court (2 Denio, 433), and the defendant's liability was established on an entirely different theory from that which affirmed the enterprise of conveying water into the city to be a private work, as distinguished from an act of municipal government, the doctrine of the opinion below being substantially repudiated. See this case commented on in *Darlington v. The Mayor &c. of New York* (31 N. Y. 200). It has been held, in Pennsylvania, that a city, in supplying gas to its inhabitants, acts as a private corporation, and is subject to the same duties, liabilities, and disabilities. It cannot impair the obligation of a contract entered into by it, in that capacity, merely because it may deem it for the benefit of its citizens to do so (*Western Savings Fund Society v. Philadelphia*, 31 Penn. St. 175).

that the fact that a public work may benefit the corporation as such, as by adding the tolls or charges for its use to the public treasury, cannot add to the reasons for its corporate liability for negligence in the management of that work. The corporation is liable for its negligence in the performance of a duty, whether it derives any advantage from the work or not.<sup>1</sup>

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<sup>1</sup> The fact that a public body acts gratuitously for the benefit of the public, is no reason for exempting it from liability for damages resulting from the negligent performance of a duty intrusted to it (*Clothier v. Webster*, 12 C. B. [N. S.] 790). A very recent case in the House of Lords (*Mersey Docks v. Gibbs*, Law Rep. 1 H. L. 93; 11 H. L. Cas. 686; 3 Hurlst. & C. [Am. ed.] 1035), is instructive on this point. The action was brought against the Mersey Docks Board of Trustees, a corporation created by Act of Parliament, with power to build docks at Liverpool and receive dock rates, which rates they are bound by statute to apply to the purposes of the act, which may in substance be stated to maintain the docks, and pay the very large debt contracted in making them. The plaintiff's vessel, while entering one of the docks, ran foul of a sand bank, which had been suffered to accumulate, and was injured. The Court of Exchequer held, that so long as the dock was kept open for the public, the duty to take reasonable care that the dock and its entrance were in such a state that those who navigate it may do so without danger, was equally cast upon the persons having the receipt of the tolls and the possession and management of the dock, whether the tolls were received for a beneficial or a fiduciary purpose. And this doctrine was reaffirmed by the House of Lords on appeal. It was contended, on the appeal, that such a corporation was a public servant or trustee, and that the principle on which persons filling that character have been held not to be civilly liable for injuries arising to private individuals from acts done by persons acting under them, would apply; and a number of cases were cited in support of the argument (*Duncan v. Findlater*, 6 Cl. & Fin. 894; *Heriot's Hospital v. Ross*, 12 Id. 507; *Lane v. Cotton*, 1 Salk. 17; *Whitfield v. Despenser*, 2 Cowp. 754; *Nicholson v. Mounsey*, 15 East, 384; *Cast Plate Co. v. Meredith*, 4 T. R. 794; *Russell v. Men of Devon*, 2 Id. 667; *Sutton v. Clark*, 6 Taunt. 29). *Blackburn, J.*, showed, however, that these cases were decided on the ground that the government was the principal, and the defendant merely the servant, and that the liability of a servant of the public was no greater than the liability of a servant of any other principal; although no remedy could be had by action against the public. But the defendant in this case was not a servant of the public in that sense. And Lord Westbury, in commenting upon and denying the language of Lord Chancellor Cottenham, in *Duncan v. Findlater* (*supra*), declared that even if the defendant were deemed a public trustee, it might render the property of its beneficiaries liable to third persons for acts done in the exercise of the trust. Lord Westbury uses this language: "It would be a very unreasonable and a very mischievous thing, if, in the case of corporations dealing with the public or with individuals, such corporation should, by any conduct of theirs in respect to property committed to their care, give a right of action to individuals, that such individuals should be deprived of the ordinary right of resorting for a remedy against the body doing or authorizing those acts, and should be driven to seek a remedy

§ 121. The policy of the law in regard to public corporations is different, however, from that which it pursues in relation to individuals and private corporations.<sup>1</sup> In chartering a municipal corporation, the state, in fact, charters a portion of itself. The theory upon which municipal government is founded is, that it conduces to the better protection and security of the person and property of the citizen. A municipal organization is only a contrivance to aid the state in the administration of the laws. This end is thought to be best accomplished by the creation of minor and subordinate organizations, composed of the inhabitants of particular localities, such as towns, cities, and villages, to which, as corporate bodies, the state delegates a portion of its sovereign powers, within prescribed geographical limits, always subject, however, to the right of supervision and modification by the supreme power.<sup>2</sup> The political power thus conferred

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against the individual corporators, whose decision or order, in the name of the corporation, may have led to the mischief complained of." The decision in this case was afterward followed in *Coe v. Wise* (Law Rep. 1 Q. B. 711, reversing S. C., 5 B. & S. 440). It substantially overrules *Metcalf v. Hetherington* (11 Exch. 257), and *Holliday v. St. Leonards Shoreditch* (11 C. B. [N. S.] 192), and explains and limits *Harris v. Baker* (4 Maule & S. 27); *Hall v. Smith* (2 Bing. 156); *Humphreys v. Mears* (1 Man. & Ryl. 187); *Boulton v. Crowther* (2 B. & Cr. 713). See chapter on OFFICERS, *post*.

<sup>1</sup> The rules of construction which apply to statutes on subjects in which the public at large is interested, are essentially different from those which apply to private grants to individuals of powers or privileges designed to be exercised with special reference to their own advantage, though involving in their exercise incidental benefits to the community generally. The former are to be expounded largely and beneficially for the purposes for which they were enacted; the latter liberally in favor of the public, and strictly as against the grantees (*Bradley v. N. Y. & New Haven R. Co.*, 21 Conn. 294; *Florida &c. R. Co. v. Pensacola & Georgia R. Co.*, 10 Fla. 145; but compare *State v. Noyes*, 47 Me. 189; *Leonard v. Canton*, 35 Miss. 189; *Douglas v. Placerville*, 18 Cal. 643; *Morris Canal & R. Co. v. Central R. Co.*, 16 N. J. [Eq.] 419). While private corporations, exercising their corporate functions for the benefit of the members, are liable to individuals for an omission or misperformance of those functions, it is otherwise of public corporations instituted for the purposes of government, unless an action against them be given by statute (*White v. Charleston*, 2 Hill [S. C.] 571).

<sup>2</sup> It is said in *Cudden v. Eastwick* (1 Salk. 193; Holt, 433; 6 Mod. 123), that a



by the state cannot become a vested right as against the government.<sup>1</sup> It is a public trust, which the state may revoke or modify, and which is to be exercised solely for the good of the community.<sup>2</sup>

§ 122. The legislature has, therefore, absolute power, except as restricted by the federal constitution, to impose upon a public corporation such corporate obligations as shall best protect and subserve the interests of the public, either in its charter, as a condition of the grant, or subsequently by an independent act imposing additional bur-

municipal corporation is properly an investing of the people of the place with the local government thereof.

<sup>1</sup> *People v. Morris*, 13 Wend. 325. See *Terrett v. Taylor*, 9 Cranch, 43; *Bradford v. Cary*, 5 Greenl. 339; *Marietta v. Fearing*, 4 Ohio, 427; *Bush v. Shipman*, 4 Scam. 186; *Trustees of Schools &c. v. Tatnam*, 13 Ill. 27; *Mills v. Williams*, 11 Ired. [N. C.] Law, 558.

<sup>2</sup> "City corporations are emanations of the supreme law-making power of the state, and they are established for the more convenient government of the people within their limits." "A corporation, as such, has no human wants to be supplied. It cannot eat, or drink, or wear clothing, or live in houses. It is the representative or trustee of somebody, or of some aggregation of persons. We cannot conceive the idea of an aggregate corporation which does not hold its property and franchises for some use, public or private. The corporation of Dartmouth College was held to be the trustee of the donors, or of the youth needing an education and moral and intellectual training. The corporation of New York, in my opinion, is the trustee of the inhabitants of that city. The property, in a general and substantial, although not technical sense, is held in trust for them. They are the people of the state, inhabiting that particular subdivision of the territory, a fluctuating class, constantly passing out of the scope of the trust by removal and death, and as constantly renewed by fresh accretions of population. It was granted for their use and for their benefit. The powers of local government committed to the corporation are precisely of the same character. They were granted, and have been confirmed and regulated, for the good government of the same public, to preserve order and obedience to the law, and to ameliorate and improve their condition, and subserve their convenience as a community" (per Denio, J., in *Darlington v. Mayor &c. of New York*, 31 N. Y. 164; see *People v. Kerr*, 27 N. Y. 188; *Parsons on Contr.* 5th ed. 529; *People v. Morris*, 13 Wend. 325, and cases cited *supra*). Judge Parsons, in his work on contracts, uses this language (vol. iii. 529): "The whole transaction amounts to no more than a change made by the public in the manner in which, or the agents by whom, it shall continue to hold and use a certain portion of its property or interests. \* \* \* It is no contract at all."

dens and charges,<sup>1</sup> or removing old ones.<sup>2</sup> Thus, so early as 1285, by the Statute of Winchester, Parliament provided a remedy against the hundred or county, &c., in which a robbery should take place, for damages caused thereby, to be recovered by the party robbed, in an action against any one or more of the inhabitants. This statute was afterward re-enacted;<sup>3</sup> and provision was made for assessment on all the inhabitants of the damages recovered in such an action. The several "riot acts" of England, and of various states of the American Union, giving a right of action against a city or county for damages done by a mob or riot, are founded on the same principle. Of the same character are the acts of a legislature giving a remedy against a town or county or municipal corporations at the suit of a citizen sustaining injuries by reason of the defective condition of a street or bridge within their limits. It has been strenuously contended, and in some cases so held by the court,<sup>4</sup> that while such an

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<sup>1</sup> The legislature may *limit* the liability of a municipal corporation. Thus an act of the legislature exempting a city from liability in a class of cases arising from the negligence of its officers and employees is a good defense to an action brought against the city for the injuries previously sustained in consequence of the non-repair of a street (*Gray v. Brooklyn*, 50 Barb. 365; *Parsons v. San Francisco*, 23 Cal. 462).

<sup>2</sup> *Darlington v. Mayor &c. of New York*, 31 N. Y. 164; *People v. Morrell*, 21 Wend. 563; *Booth v. Woodbury*, 32 Conn. 118. "I suppose it must be conceded that the legislature has ample power to declare any act legal or illegal, and to impose liability for damages to a party injured, in all cases in which there is no restriction contained in the fundamental law which limits their powers. If the constitution does not affix a limit by prescribing cases in which they may not act, they have full authority to legislate in regard thereto" (per Ingraham, J., in *Wolfe v. Supervisors of Richmond*, 11 Ab. Pr. 272; and see *Donoghue v. County*, 2 Penn. St. 280; *Savery v. Same*, Id. 231; *County v. Leidy*, 10 Id. 45; *St. Michael's Church v. County*, *Brightly*, 145). In *Stone v. Mayor &c. of New York* (25 Wend. 181), Senator Verplanck said, that "the legislature might with perfect justice, if sound policy was thought to require it, make our towns and counties severally responsible for damages hereafter arising from robbery within them, or from public tumults, on the principle of the English riot act."

<sup>3</sup> 28 Edward III. c. 2; 27 Eliz. c. 13, § 2.

<sup>4</sup> *Green v. Mayor &c. of New York*, 5 Abb. Pr. 503; *People v. Haws*, 37 Barb. 440. But see *Booth v. Woodbury*, 32 Conn. 118.

exercise of legislative power over counties and other *quasi* corporations may not be open to question, a very different question arises as to municipal corporations. It is contended that municipal corporations are not only the holders of powers and franchises bestowed upon them by the legislature, but that they hold property derived from other sources than the legislature, and which they hold by the same right and title, and subject only to the same liabilities, as private individuals, that such property cannot be taken from them for private use by any law, nor taken for public use without compensation, and therefore that an act of the legislature making a city liable for property destroyed or injured by a mob is a violation of the constitutional prohibition in reference to taking private property. This subject has lately undergone a very thorough examination in the court of last resort in the State of New York;<sup>1</sup> and it was decided that the property of a city corporation is not private property in the sense of the constitution, and therefore that a statute providing for the compensation by the city of persons whose property was destroyed by mobs was valid and constitutional, notwithstanding that the act provided no means of raising funds, either by taxation or by release of the moneys raised by taxation from the special purposes to which they were applied.<sup>2</sup>

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<sup>1</sup> *Darlington v. Mayor &c. of New York*, 31 N. Y. 185. Compare *Brinckerhoff v. Board of Education*, 2 Daly, 443; 6 Abb. N. S. 428; *People v. Morris*, 13 Wend. 325; *Davidson v. Mayor &c. of New York*, 27 How. Pr. 342; *Luke v. Brooklyn*, 43 Barb. 54; *Rittenhouse v. Baltimore*, 25 Md. 336; *Chicago v. Halsey*, 25 Ill. 595; *Regina v. Stamford*, 6 Q. B. 433; *Jones v. Carmarthen*, 8 Mees. & W. 605; *Regina v. Ledyard*, 1 Q. B. 616.

<sup>2</sup> In the recent case of *Brinckerhoff v. Board of Education* (2 Daly, 443; 6 Abb. [N. S.] 428) in the New York Common Pleas, Chief Justice Daly has examined with care the question of the liability of the property of municipal corporations to levy and sale under execution, and the result of an examination of the law by so capable a judge is entitled to great consideration. He says: "It may be collected as the result of this examination, that, under an execution upon a judgment against a municipal corporation, the property of the corporation, *not devoted to public use*, may

§ 123. The extent to which "negligence" may be predicated of the acts or omissions of a municipal corporation as such, in the exercise of its public functions, must depend upon the nature and extent of its obligations, a violation of which constitutes the negligence complained of: for negligence can be predicated of the acts of a person in respect of any public work, only where the duty of doing the work is imposed on him by law. To charge one in an action for negligence whereby any person has sustained special damage, the law must have imposed an imperative duty upon him, so as to make that neglect culpable.<sup>1</sup> In the case put by Judge Cady:<sup>2</sup> "Suppose a

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be taken and sold to satisfy the judgment; that, *if there is no such property*, the remedy is by *mandamus* to compel the payment of the judgment out of any money or fund under the corporate control, or to compel the raising of it by tax, when the corporation is clothed with the power to impose a tax."

<sup>1</sup> Peck v. Batavia, 32 Barb. 634. "If it be conceded that an action will lie at the suit of an individual, sustaining peculiar damages, against an officer or corporation, for an omission to perform a duty enjoined by law, it must, of course, be first established that the duty has been imposed absolutely and imperatively" (Ib. See Mayor &c. of Albany v. Cunliff, 2 N. Y. 165).

<sup>2</sup> Mayor &c. of Albany v. Cunliff, 2 N. Y. 170. This was a case where a city corporation, under the authority of a statute not constitutionally passed for want of a two-thirds vote, assumed to alter a bridge, and so negligently performed the work that it fell through and injured the plaintiff. It was held, that the latter could not maintain an action against the corporation for his damages. But this case must be distinguished from one where a person digs a ditch across a highway, over which he builds a bridge. Here he is bound to keep the bridge in repair, and is liable for damages arising from any defect in it. In this case, he created the necessity for the bridge; and the digging of the ditch was a nuisance, for the results of which he was liable. But had the town actually taken the bridge under its care, and repaired it for a long time, it would seem that it had made the bridge a town bridge, and thus relieved the builder from liability. "But, *nullus tempus occurrit reipublicæ* applies with unmitigated force against a public nuisance" (Dygert v. Schenck, 23 Wend. 446). Said Nelson, J. (in Heacock v. Sherman, 14 Wend. 58), "a bridge built by an individual over a public highway that is useful to the public, and generally used by them; or if, in the course of time, it has become useful, and is used by the public, must be kept in repair by the public; as, should a patriotic person build a bridge, at his own expense, over a public fordway, it would be more than unjust to compel him also to keep it in repair." But it is otherwise where the bridge is built for the exclusive benefit of the builder, though accommodating at the same time the public. "No man can be compelled to build or contribute to the charge of building any new bridge, without an act of Parliament" (1 Pac. Abr. 330).

traveler upon a public road comes to a narrow and deep stream, which he cannot cross without a bridge; and he immediately goes to work and makes a bridge, over which he, with his horse and wagon, passes; and shortly after another traveler attempts to pass over with a span of horses and wagon, but, unfortunately, the bridge breaks down, and both his horses are drowned. Has he a remedy against the man who built the bridge? He has not, because the law imposed on him no duty to build it."

§ 124. It is a general principle that "the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created."<sup>1</sup> As corporations are altogether creatures of statute, without which they have no existence, much less any corporate liability, it is to the statute that we must look as the criterion by which to determine the extent of their obligation to the public. If the statute, either expressly or by necessary intendment, enacts that the corporation shall not be subject to liability, there is an end of the matter; but if there is nothing in the statute showing a contrary intention in the legislature, the true rule of construction is, that the legislature intended that the corporation's liability should, to the extent of its corporate funds, be co-extensive with that imposed by the general law on individuals doing the same things.<sup>2</sup>

§ 125. The idea of considering the charter of a public corporation, equally with that of a private corporation, as a contract between the state and the corporation, in and

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<sup>1</sup> *Southampton & Itchin Bridge Co. v. Southampton Board*, 8 El. & B. 801, 812; see *ante*, § 119.

<sup>2</sup> "There is nothing illogical or inconsistent in holding that those injured by the neglect of the statutable body to fulfill the duty thus cast by the statute upon it, may maintain an action against that body, and be indemnified out of the funds vested in it by the statute" (*Mersey Docks v. Gibbs*, Law Rep. 1 H. L. 93, 107). See *ante*, § 120.

by which the latter, in consideration of the advantages conferred by the former, agrees to perform the conditions of the instrument, is naturally derived from the former custom of Great Britain of granting charters by the crown, which might either be accepted or rejected, but which were never, until modern times, forced upon communities. The grant of a charter could only be accepted as a whole,<sup>1</sup> and the corporation was held to have entered, upon its part, into a solemn contract for the performance of all the duties prescribed by its charter. Under this system, it is clear that the grant and acceptance of a charter contained every element of a contract, namely, competent parties, their free consent, a good consideration, and a lawful object. It is an old, though rarely applied, principle of law, that a contract made expressly for the benefit of a third person (with some exceptions in respect to deeds, not material to this point), may be enforced by such person so long as the parties thereto have not agreed to rescind it.<sup>2</sup> It followed from this principle, that a contract made by the state, being for the benefit of the public, could be made the foundation of an action by any private individual specially injured,<sup>3</sup> and, therefore, that a private action would lie for the neglect of a municipal corporation to perform duties imposed upon it by its charter, where the plaintiff was specially injured by such neglect.<sup>4</sup> In

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<sup>1</sup> A charter must be accepted or rejected by the corporate body *in toto*; otherwise a corporation might reject the obligation imposed, and accept the benefit conferred upon them (*Rex v. Westwood*, 7 Bing. 1, 90; 2 Dow & C. 21; see *Riddle v. Proprietors of Locks and Canals*, 7 Mass. 169; *Goshen &c. Turnpike Co. v. Sears*, 7 Conn. 86; *Bushwick & Newtown Bridge Co. v. Ebbets*, 3 Edw. 353; *Rex v. Amery*, 1 T. R. 575; *Rex v. Passmore*, 3 Id. 199, 240; *Rex v. Cambridge*, 3 Burr. 1647; 1 Wm. Blackst. 547; *Rex v. Westwood*, 4 Barn. & C. 781; 7 Dowl. & R. 267; *Ewre v. Strickland*, Cro. Jac. 240).

<sup>2</sup> *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178; *Van Schaick v. Third Av. R. Co.*, 38 N. Y. 346.

<sup>3</sup> *Robinson v. Chamberlain*, 34 N. Y. 389; *Fulton Ins. Co. v. Baldwin*, 37 N. Y. 648; *Mayor &c. of Lyme Regis v. Henley*, 1 Bing. N. C. 222.

<sup>4</sup> *Mayor &c. of Lyme Regis v. Henley*, 1 Bing. N. C. 222.

the United States, the executive authorities have no power to create municipal or other corporations. That power belongs exclusively to the legislative branch of government; and the legislature may, and of late years almost always does, impose charters upon municipal corporations, without asking the consent of the people or bodies affected thereby.<sup>1</sup> Indeed, it is held, in some states, that the legislature cannot leave it to the people of a city to decide whether they will accept a charter.<sup>2</sup> Where a charter is imposed or amended without consulting the people affected thereby, it is manifest that one material element of a contract is wanting. But it may be justly presumed that the legislature, in adopting the ancient form of incorporation, intended to preserve to the citizen all the advantages which he had under the old system. And as, in cases where a particular sum of money is made by statute payable from one person to another (as a penalty or otherwise), the remedy of the creditor has always been in form *ex contractu*,<sup>3</sup> so the obligations imposed by a charter upon a municipal corporation, though not voluntarily assumed by it, may well be deemed *quasi* contracts, to be enforced by private individuals in the same manner as the provisions of charters freely accepted.<sup>4</sup> It is only

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<sup>1</sup> Municipal corporations are absolutely created by the act of incorporation itself, without the acceptance of the people, or any act on their part, unless otherwise provided by the act itself (*Berlin v. Gorham*, 34 N. H. 266; *Gorham v. Springfield*, 21 Me. 58).

<sup>2</sup> In New Jersey it is held that a charter granted by the legislature to a municipal corporation, may be constitutionally submitted to the corporators for their acceptance before it goes into operation; and its going into effect may be made to depend on their acceptance or rejection. It is well settled that the legislative authority cannot be delegated; but a vote of acceptance, by the corporators, of the charter as tendered is not an act of legislation (*Paterson v. Society for Establishing Manufactures*, 4 Zab. 385). But in New York, in several unreported cases, the contrary has been adjudged upon the basis of the doctrine in *Barto v. Himrod* (8 N. Y. 483). See *Taylor v. Newborne* (2 Jones [N. C.] Eq. 141), in which it seems to have been either held or assumed that acceptance of the charter was necessary to its validity.

<sup>3</sup> *People v. Bennett*, 6 Abb. Pr. 343; *People v. Muller*, 6 Id. 344, *note*.

<sup>4</sup> In a very recent case in Connecticut (*Jones v. New Haven*, 34 Conn. 1), the court makes a distinction between a duty imposed upon a city by a mere act of legislation,

in the light of this doctrine that the cases, ancient as well as modern, can be reconciled, and so construed as to be reduced to an intelligible rule.

§ 126. We must, then, look upon the charter of a municipal corporation, or the statute by which it is incorporated, as in the nature of a contract between it and the state to perform, on its part, the duties imposed—a contract which inures to the benefit of every individual interested in its performance.<sup>1</sup> Where, therefore, the legisla-

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without its assent, and a contract voluntarily entered into between the city, on the one hand, and the sovereign power on the other. In that case, the charter of the city of New Haven, which was accepted by the city, gave the common council of the city power to make by-laws for the regulation and protection of trees in the public squares and streets, and the common council passed a by-law imposing a fine upon any person who should cut or otherwise injure any shade-tree in any public square or street without special license. A dead limb, which the city had negligently allowed to remain upon a tree in a public square, fell upon and injured the plaintiff, who was passing under. It was held that the city was liable. Carpenter, J., said: "This duty is not, strictly speaking, a public one. It is not a matter in which the public at large, outside the immediate vicinity of New Haven, have any particular interest. It is not a power or duty imposed upon the city by general law; nor is it applicable alike to all cities; but it is a special power or privilege conferred upon the city at its request. \* \* \* The city has undertaken the duty of keeping these trees in proper condition. It negligently permitted one of them to be in an unsafe condition, whereby the plaintiff was injured. I am unable to see upon what principle the defendant can be exempted from liability."

<sup>1</sup> Selden, J., in *Weest v. Brockport* (16 N. Y. 161, *note*), states the principle thus: "Whenever an individual or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, either express or implied, to do certain things, such individual or corporation is liable in case of neglect to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect. The contract made with the sovereign power is deemed to inure to the benefit of every individual interested in its performance." This principle was approved and followed in *Hickok v. Plattsburgh*, 1b. 161, and all the cases in New York since. Marvin, J., in *Peck v. Batavia* (32 Barb. 642), speaking of this case, says: "Now, as I understand the state of the law as established in *Hickok v. Plattsburgh*, it is that an incorporated village, being a separate highway district, whose trustees are, by its charter, constituted commissioners of highways, or upon whom is devolved the powers and duties of highway commissioners, is liable in an action, by a private individual, for damages arising by reason of the defective condition of the streets and highways in such village; in other words, for the omission of the corporation (assuming it responsible for the omissions of its trustees) to keep in repair the streets and highways. And, as I understand, this position is reached by giving to the statute an effect, when applied to a municipal corporation, not given to it when applied to town commissioners of highways, in



ture makes it the duty of a municipal corporation to maintain and keep in repair the highways within its limits, it becomes liable for any negligence in the performance of such duty to any person who, without fault on his part, is specially damaged<sup>1</sup> thereby. But, as already stated,<sup>2</sup> where the law does not impose a particular duty upon a corporation, and no such duty can be inferred from its charter or act of incorporation, no action will lie either for misfeasance or malfeasance. It therefore becomes necessary to ascertain in each case what the contract is; and this presents the question of *construction* in all cases where the contract is to be found in the statute.

§ 127. The statute may enjoin, absolutely and imperatively, the performance of an act or duty, or it may leave it to the discretion of the corporation either to do it or

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reference to whom the statute was made. And this upon the idea that in the latter case there was no contract, founded upon a good consideration, between the state and the highway commissioners, that they should perform the duties enjoined in a general way in the statute; and in the former that such contract may be implied, having for its consideration 'privileges of great value,' and 'franchises,' conferred by the charter, and for the breach of such contract an individual sustaining damage may maintain an action."

<sup>1</sup> *Wendell v. Troy*, 39 Barb. 329; affirmed, 4 Keyes, 261. See the chapter on HIGHWAYS. The Supreme Court of the United States, in the case of *Chicago v. Robbins* (2 Black, 418), held that municipal corporations, upon which is imposed the duty to construct and repair streets and bridges, and upon which are also conferred the means of doing so, are liable for any special damage arising from their neglect to perform this duty (see *Nebraska v. Campbell*, 2 Black, 590). And in another case in the same court, the principle is stated to be that where a duty of general interest (as to maintain a bridge) is enjoined upon a municipal corporation in consideration of the privileges granted and enjoyed, and the means for its execution are at the disposal of the corporation, the corporation is responsible for shortcomings in the plan or execution of the work, which it is its duty to perform (*Weightman v. Washington*, 1 Black, 39; S. P., *Jones v. New Haven*, 34 Conn. 1). In *Wendell v. Troy* (*supra*), it was held that the want of funds was no defense.

<sup>2</sup> *Ante*, § 123. In order to charge a municipal corporation, or, indeed, any person, in an action for negligence in the construction or repair of a public work, the law must have imposed the duty, or conferred an authority to do it. If a municipal corporation construct or repair a bridge which their legal duty does not require, they are not liable for injuries resulting from negligence in the execution of the work. The mere builder is only liable to his employer (*Mayor &c. of Albany v. Cunliff*, 2 N. Y. 165; reversing S. C., 2 Barb. 190).

not to do it. If the latter is the case, courts cannot compel the performance of such duties, or hold the corporation responsible for its refusal to act. A large part of the functions of a city corporation are legislative or governmental; and necessarily a wide discretion is confided to it in determining the means of accomplishing its ends,<sup>1</sup> and the courts will not supervise that discretion.<sup>2</sup> Otherwise, if the courts could by writ of *mandamus* or other process compel the opening and paving of streets, building of sewers, &c., not in conformity with the views of local officers, inextricable confusion in the administration of government would ensue. For the duty of building public works of this kind is one requiring the exercise of deliberation, judgment, and discretion. It admits of a choice of means, and the determination of the order of time in which

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<sup>1</sup> *Weightman v. Washington*, 1 Black, 39. Clifford, J., said: "Municipal corporations undoubtedly are invested with certain powers, which, from their nature, are discretionary, such as the power to adopt regulations or by-laws for the management of their own affairs, or for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen, and for many other useful and important objects within the scope of their charters. Such powers are generally regarded as discretionary, because, in their nature, they are legislative; and although it is the duty of such corporations to carry out the powers so granted and make them beneficial, still it has never been held that an action on the case would lie against the corporation at the suit of an individual for the failure on their part to perform such a duty. But the duties arising under such grants are necessarily undefined, and, in many respects, imperfect in their obligation, and they must not be confounded with the burdens imposed, and the consequent responsibilities arising under another class of powers usually to be found in such charters, when a specific and clearly defined duty is enjoined in consideration of the privileges and immunities which the act of incorporation confers and secures."

<sup>2</sup> *Wilson v. Mayor &c. of New York*, 1 Denio, 595, and cases *supra*. In *Joliet v. Verley*, 35 Ill. 58, 63, Beckwith, J., says: "The legal obligation of a city to repair highways, streets, sidewalks, and bridges within its corporate limits, is one voluntarily assumed by its corporate authorities and relates to such as are opened or constructed or allowed to be opened or constructed under its authority, and those which its officers assume control over for that purpose. \* \* \* Cities are under a political obligation to open such streets and build such market houses as the convenience of the community requires; but courts cannot compel the performance of such duties or hold them responsible for their non-performance. \* \* \* But after a city has constructed a walk, it is its duty to keep it in such repair as to enable travelers safely to pass over it."

such improvements shall be made. It involves also a variety of prudential considerations relating to the burdens which may be discreetly imposed at a given time, and the preference which one locality has over another. Hence a municipal corporation is liable neither for an omission to exercise its discretion as to a particular matter, nor for the consequences of its lawful exercise.<sup>1</sup>

§ 128. Thus, in a case where the charter of a village simply conferred upon the trustees "power to construct and repair sidewalks, and assess the expense against the abutters," it was held that this conferred a power, but did not impose a duty, and that the village was not liable for injuries caused by non-repair of a sidewalk.<sup>2</sup> A statute which requires the overseers of highways to repair and keep in order the highways within their road districts, &c., does not impose "a certain, stable, and absolute duty," so as to make overseers liable in a civil action for non-performance.<sup>3</sup> And a municipal corporation is not liable for

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<sup>1</sup> *Mills v. Brooklyn*, 32 N. Y. 489. Municipal corporations, in the exercise of their political, discretionary, and legislative authority, are not liable for the misconduct, negligence, or omissions of the agents employed by them. But in the discharge of ministerial or specified duties assumed in consideration of the privileges conferred by their charter, they are responsible for the misconduct, negligence, or omissions of their servants, and this is true where there is an absence of special rewards or advantages, it being considered that such gratuitous function is to be regarded as a burden accepted under the charter in consideration of its privileges (*City of Richmond v. Long*, 17 Gratt. 375).

<sup>2</sup> *Peck v. Batavia*, 32 Barb. 634; *Cole v. Medina*, 27 Id. 218.

<sup>3</sup> *Bartlett v. Crozier*, 17 Johns. 438. This is a leading case in New York on the construction of the highway statutes of that State, and has been uniformly followed and approved (see *Garlinghouse v. Jacobs*, 29 N. Y. 297, and the numerous cases there cited). A statute giving only a discretionary power to a local public board to place and keep in repair fences, &c., does not impose upon them an absolute duty; and an action will not lie for injuries sustained through their failure to do so (*Wilson v. Halifax*, Law Rep. 3 Exch. 114). In Louisiana it has been held, in a case where a municipal corporation was sued for negligence in not repairing a draining machine erected for public utility, by which neglect plaintiff's premises were overflowed and his property damaged, that as the act complained of involved the disbursement of the corporate revenues, it was a matter of discretion with the corporate authorities, and that if the plaintiff was damaged, it was *damnum absque*

neglecting to provide a sufficient number of inlets to its sewers, which were sufficient when constructed; but have ceased to be so in consequence of the increase of population, and the greater extent of territory graded and built upon.<sup>1</sup> To allow an owner of property to prosecute the corporation, on the ground that sufficient sewerage had not been provided for his premises, would be to submit these questions to the determination of a jury; and thus, in effect, a judicial tribunal would be exercising the functions of a common council.<sup>2</sup>

§ 129. And on the other hand, a city corporation is not liable for a lawful exercise of its legislative powers in directing a public work to be undertaken. The laying out and grading of new streets, of public parks, and other works of like public utility, can hardly ever be undertaken without injury to the property of adjacent owners. Compensation for land actually taken must, by the constitutional provision, be made to the owner, but unless the statute which authorizes the work specially provides it, there is no remedy for one whose land is not taken, but who suffers consequential injuries by reason of the im-

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*injury*, and he was consequently without sufficient cause of action (*Bennett v. New Orleans*, 14 La Ann. 120). A count averring that a bridge was private property, not belonging to the corporation, and had become a public nuisance from its unsafe and rotten condition, and that said corporation, knowing this, failed to abate it, as they by law were authorized and required to do, whereby, &c., is bad on demurrer: the failure to exercise judicial power properly, in the absence of malice and corrupt intention, constitutes no ground of action (*Smoot v. Wetumpka*, 24 Ala. 112).

<sup>1</sup> *Carr v. Northern Liberties*, 35 Penn. St. 324. In that case Lowrie, C. J., said: "We do not admit that the grant of authority to the corporation to construct sewers amounts to an imposition of a duty to do it. Where any person has the right to demand the exercise of a public function, and there is an officer or set of officers, authorized to exercise that function, there the right and the authority give rise to the duty; but when the right depends upon the grant of authority, and that authority is essentially discretionary, no legal duty is imposed. We cannot treat it as imposed here without assuming an improper control of municipal affairs. The courts cannot redress all evils. By exceeding their proper functions they may at last do nothing well."

<sup>2</sup> See *Commissioners v. Duckett*, 20 Md. 468.

provement. Such consequential damages do not come within that clause of the constitution which prohibits the taking of private property for the public use without compensation first assessed and tendered.<sup>1</sup> Such injuries are *damnum absque injuria*, and the maxim *salus populi suprema lex* applies.<sup>2</sup> Thus where a municipal corporation, in grading one of its streets, as it was authorized to do, removed a high bank in the street, which constituted a natural support to the premises of an adjoining owner, so that a portion of his land fell, it was held that, as there was no allegation of malice or want of care or skill, such owner could not maintain an action for the damages sustained by him.<sup>3</sup>

§ 130. The performance of a statutory obligation by a municipal corporation may be discretionary as to individuals, and yet imperative as to the state. As against individuals the corporation has a discretion whether or not it will exercise the powers conferred, but not as against the state.<sup>4</sup> Under this principle, words of permission in

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<sup>1</sup> Smith v. Washington, 20 How. [U. S.] 135; Macy v. Indianapolis, 17 Ind. 267; Hove v. Alexandria, 1 Cranch C. C. 98; Drake v. Hudson River R. Co., 7 Barb. 508, 542; Graves v. Otis, 2 Hill. 466; Benedict v. Goit, 3 Barb. 459; State v. Graves, 19 Md. 351; Ferris v. Bramble, 5 Ohio St. 109; Waddell v. Mayor &c. of New York, 8 Barb. 95; Creal v. Keokuk, 4 Greene [Iowa], 47; Humes v. Knoxville, 1 Humph. 403; O'Connor v. Pittsburgh, 18 Penn. St. 187; Roberts v. Chicago, 26 Ill. 249; Cole v. Muscatine, 14 Iowa, 296; Clark v. Wilmington, 5 Harringt. 243; Murphy v. Chicago, 29 Ill. 279; St. Louis v. Gurno, 12 Mo. 414; Lambar v. St. Louis, 15 Mo. 610; White v. Yazoo, 27 Miss. 357; People v. Renss. & Saratoga R. Co., 15 Wend. 113; Bailey v. Phil. & Wil. R. Co., 4 Harring. 389; People v. St. Louis, 5 Gilm. 351; Spooner v. McConnell, 1 McLean C. C. 337; Pennsylvania v. Wheeling Bridge Co., 13 How. 518; Wilson v. Blackbird Creek M. Co., 2 Pet. 245; Hogg v. Zanesville Canal Co., 5 Ohio, 410; United States v. N. Bedford Bridge Co., 1 Woodb. & M. 401; Attorney General v. Hudson River R. Co., 1 Stockt. Ch. 526; Getty v. Hudson River R. Co., 21 Barb. 617.

<sup>2</sup> See Broom's Leg. Maxims, 1; see also chapter on HIGHWAYS, *post*.

<sup>3</sup> Radcliffe v. Brooklyn, 4 N. Y. 195; Kavanagh v. Brooklyn, 38 Barb. 232. In Lambar v. St. Louis (15 Mo. 610), it was held that the city of St. Louis was not liable for digging a ditch by authorized agents, under her proper ordinances, injurious to another, it not being carelessly done or negligently managed. See also Larkin v. Saginaw, 11 Mich. 88; Logansport v. Wright, 25 Ind. 512.

<sup>4</sup> People v. Albany, 11 Wend. 539. Although municipal corporations may be in-

a statute will sometimes be construed as words of command,<sup>1</sup> but only in those cases, it seems, where the public interests and rights are concerned, or where the public or third persons have a claim *de jure* to insist that the power shall be exercised.<sup>2</sup> Thus where a statute confers power upon a municipal corporation to make sewers and drains, though permissive, yet in its nature it is plainly imperative;<sup>3</sup> and an indictment will lie for neglect of duty

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dicted for willful neglect to make all needful drains as required by a statute, still they have a discretion as against individuals, and are not liable for injuries resulting from neglect to do so (*Wilson v. Mayor &c. of New York*, 1 Den. 595). While private corporations, exercising their corporate functions for the benefit of the members, are liable to individuals for an omission or mis-performance of those functions, it is otherwise as to municipal corporations, unless an action against them be given by statute (*White v. Charleston*, 2 Hill [S. C.], 571). It seems that if under its charter it should become the duty of the city authorities to collect an assessment from a lot for grading done upon the street in front of it, or to take the proper steps for this purpose, and by neglect or collusion with the owner of the lot they should suffer him to obtain an injunction upon their performing such duty, then the city should be held liable (*Eilert v. Oshkosh*, 14 Wisc. 586).

<sup>1</sup> *Attorney General v. Lock*, 3 Atk. 166; *Barnes v. Badger*, 41 Barb. 98; *People v. Yonkers*, 39 Barb. 266; *People v. Brooklyn*, 22 Barb. 404; *Bolton v. Crowther*, 2 B. & Cr. 713; 4 Dowl. & Ryl. 197; *Rex v. Hastings*, 1 Id. 148; *Rex v. Eye*, 3 Id. 172, 176, and note; *Blakemore v. Glamorganshire Canal Co.*, 1 Myl. & K. 154; *Allnut v. Inglis*, 12 East, 527; *Rex v. Lindsay*, 14 Id. 317; *Rex v. Cumberworth*, 3 Barn. & Ad. 108; 4 Ad. & El. 731; *Rex v. Edge Lane*, 4 Ad. & El. 723; and see *Scales v. Pickering*, 4 Bing. 448, 452; *Stourbridge Canal Co. v. Wheeley*, 2 Barn. & Ad. 792, and cases *infra*.

<sup>2</sup> *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 101; citing *Stamper v. Miller*, 3 Atk. 212; *Blackwell's Case*, 1 Verm. 152; *The King v. Barlow*, 2 Salk. 609; *The King v. Derby, Skinner*, 370. In the last case, on a motion to quash an indictment against the inhabitants of a parish for refusing to meet and make a rate to pay the constable's tax, it was insisted that the statute, "they *may* meet," was not imperative; but the court said, "*may*, in the case of a public officer, is tantamount to *shall*, and if he does not do it, he shall be punished," &c. To similar effect are *Buffalo & Batavia Plankroad Co. v. Lancaster* (10 How. Pr. 237); *Malcom v. Rogers* (5 Cow. 188), and *Minor v. Mechanics' Bank* (1 Pet. 63); and see *New York & Erie R. Co. v. Coburn*, (6 How. Pr. 223); *Gale v. Mead* (2 Den. 160); *People v. Supervisors &c. of N. Y.* (11 Abb. Pr. 114). A statute declaring that "it shall be the duty of the supervisors of," &c., to raise a certain sum by tax, and therewith erect county buildings, &c., has been held mandatory (*Caswell v. Allen*, 7 Johns. 63; *Morris v. People*, 3 Denio, 381).

<sup>3</sup> Per *Beardsley, J.*, *Wilson v. Mayor &c. of N. Y.*, 1 Den. 595; *Mayor &c. of N. Y. v. Furze*, 3 Hill. 612; *People v. Albany*, 11 Wend. 539, and cases *supra*.

in that respect.<sup>1</sup> And so, in a proper case, a mandamus will issue to compel a public officer to perform a duty peremptorily imposed upon him by statute.<sup>2</sup> In general the question whether a power given by law is merely permissive must be determined by its nature and object, by the public convenience, and by what may be understood to have been the intention of the legislature.<sup>3</sup>

§ 131. Having seen that a municipal corporation is not answerable in a private action for the non-performance of duties, the performance of which rests in discretion, we proceed to consider that other class of duties which are absolute and imperative in their nature, and for the non-performance or mis-performance of which the corporation will be liable, both to public prosecution and to a private action. Under an obligation imperatively imposed, a municipal corporation no longer enjoys the immunity incident to its governmental functions, but stands on the same footing, in respect to liability for negligence in the exercise of its powers, as an individual. As to what words in a statute will be construed as imposing an absolute obligation on a municipal corporation, we do not deem it necessary to recapitulate the remarks elsewhere made, to which the reader is referred.<sup>4</sup>

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<sup>1</sup> *Ib.*; *State v. Raleigh*, 3 Jones [N. C.] Law, 399. A municipal corporation is indictable for not completing a street (*Nichols v. Salem*, 14 Gray, 490). An action on the case will lie against a city corporation for the neglect of the city council in failing to collect an assessment to pay for plaintiff's land taken for a street (*Clayburgh v. Chicago*, 25 Ill. 535). The exercise of a power conferred on a corporation to be exercised for the public good is not discretionary, but imperative; and the words, "power and authority" in such case may be construed "duty and obligation" (*Commissioners v. Allegany*, 20 Md. 449; *Commissioners v. Duckett*, 20 Md. 468; *Smith v. State*, 1 Kansas, 365).

<sup>2</sup> *People v. Supervisors of N. Y.*, 11 Abb. Pr. 114.

<sup>3</sup> *Middle Bridge Proprietors v. Brooks*, 13 Me. 391; compare *Foss v. Harbottle*, 2 Hare, 461; *People v. Utica Ins. Co.*, 15 Johns. 358; *Donaldson v. Wood*, 22 Wend. 395; *Weed v. Tucker*, 19 N. Y. 422; *Livingston v. Tanner*, 14 Id. 64, reversing S. C., 12 Barb. 481; *Striker v. Kelly*, 7 Hill, 9; *Marchant v. Langworthy*, 6 Id. 646.

<sup>4</sup> See *ante*, §§ 127-130, and the chapters on PUBLIC OFFICERS, and HIGHWAYS.

§ 132. It is important, however, to observe that an imperative duty as to a public work may arise, though not imposed in express terms by statute. In each case we must ascertain what the *contract* is, and then see whether it raises a duty.<sup>1</sup> If a corporation has, from time immemorial, kept a certain bridge in repair, the law will presume that the keeping of the bridge in repair was, though not expressed in its charter, one of the conditions of its incorporation. Thus, in an early English case,<sup>2</sup> a corporation which, from time immemorial, had repaired a creek, was held liable to one sustaining damages from its not being in repair: the decision being put upon the ground that the corporation, having immemorially been used to repair the creek, it might have been the very condition and terms of its creation and charter.<sup>3</sup> As has been remarked,<sup>4</sup> every prescription presupposes a contract by which the right was originally obtained, or the obligation assumed. Hence, an averment in a complaint that the defendant was bound by prescription to keep a ferry-boat for crossing a certain river, and that all the inhabitants of a certain vill were, by custom, entitled to pass and repass, toll free, was held good on demurrer.<sup>5</sup>

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<sup>1</sup> Per Marvin, J., *Peck v. Batavia*, 32 Barb. 640; compare *Jones v. New Haven*, 34 Conn. 1.

<sup>2</sup> *Mayor of Lynn v. Turner*, 1 Cowp. 86; and see *Henley v. Mayor &c. of Lyme Regis*, 5 Bing. 91; 7 Bing. [N. C.], 222.

<sup>3</sup> By the common law, all corporations were bound to keep the houses belonging to their benefices in repair; and were bound, in case of falling into decay, to account for the dilapidations (*Kyd on Corp.* 218).

<sup>4</sup> Per Selden, J., *Weet v. Brockport*, 16 N. Y. 161, *note*. In *Fielding v. Fay* (*Cro. Eliz.* 569), it was averred in the complaint that the defendant was *bound by custom* to keep a bull and boar for the use of the parishioners, the plaintiff being one of them, &c. The court held that it was a good and reasonable custom, and that every inhabitant prejudiced by the omission might maintain an action.

<sup>5</sup> *Payne v. Patridge*, 1 Shower, 255. Lord Holt, in that case, says: "If a ferry were granted at this day, he that accepts such grant *is bound* to keep a boat for the public good. \* \* \* He that has a new ferry by grant, when he accepts of it, charges himself with the repairs and keeping it." The same principle was maintained in the leading case of *Henley v. Mayor &c. of Lyme Regis* (5 Bing. 91; 3 Barn. & Ad. 77; affirmed, 1 Bing. [N. C.], 222).



But the mere fact that a city corporation has occasionally made repairs on a public work, *e. g.*, a sewer substituted for a natural channel, is no evidence of a voluntary assumption of the duty of maintaining it on the part of the city.<sup>1</sup>

§ 133. It should be further observed, that the obligation of a corporate body to perform a specific duty is more absolute and binding than the obligation resting upon officers, trustees, and other *quasi* corporate bodies to perform the same duty. Considerations which will exempt the one, may not exempt the other from liability. Thus, while commissioners of highways, who are generally compelled under a penalty to accept office, whose services are generally gratuitous, and who do not possess means or coercive powers to obtain them, are not personally liable for an omission or neglect to keep their highways in repair, yet where such commissioners become incorporated, or the trustees of an incorporated village are made by its charter commissioners of highways therein, the duties of such commissioners become absolutely binding upon the corporation, and it is responsible for the condition of its highways.<sup>2</sup> It makes no difference

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<sup>1</sup> *Munn v. Pittsburgh*, 40 Penn. St. 364. It is not a case of dedication to public use, whereby the corporation becomes bound to repair by adopting it, so that the making of repairs becomes evidence of adoption. And the corporation would not be liable for damages done to lot-owners by the falling in of the old sewer thus substituted for the natural channel, unless the damage was caused by the negligence of its agents in connecting their sewer with the old one, or in not keeping their own sewer in order, or in bringing into the old sewer such an additional quantity of water as to gorge and break it (*Ib.*)

<sup>2</sup> *Conrad v. Ithaca*, 16 N. Y. 158; *Hickok v. Plattsburgh*, *Id.* 161, *note*; *Weet v. Brockport*, *Id.* 161, *note*; *Hyatt v. Rondout*, 44 Barb. 385; *Wendell v. Troy*, 39 *Id.* 329; 4 *Keyes*, 261; *Peck v. Batavia*, 32 Barb. 624; *Cole v. Medina*, 27 *Id.* 218; *Rusch v. Davenport*, 6 Iowa, 443; *Mersey Docks v. Gibbs*, Law Rep. 1 H. L. 93; 11 H. L. Cas. 686; 3 *Hurlst. & C.* [Am. ed.], 1035; *Coe v. Wise*, Law Rep. 1 Q. B. 711. By the charter of the city of Lockport it was declared that the common council should be commissioners of highways in and for said city, and should have all the powers, and discharge all the duties of commissioners of highways in the towns of the state. It was held that it was negligence not to keep the streets of the city in

whether the alleged negligence was a mere omission, or a negligent exercise of their powers. The powers are given to the trustees in their corporate capacity, and not as individuals.<sup>1</sup> An absolute obligation and liability thereby attach, and the corporation is bound to keep its roads in proper repair, and free from obstructions and defects which ordinary vigilance and care can detect and remove,<sup>2</sup> and the want of corporate funds is no excuse for a failure to do so.<sup>3</sup>

§ 134. Having ascertained the principles upon which the liability of a municipal corporation for negligence in any case is founded, we proceed to examine the rules of law governing such liability in particular cases. These cases may be conveniently classified into those which relate (1) to the persons whose acts or omissions will be imputed to the corporation, and (2) to the particular acts or omissions as to which actionable negligence may be predicated.

§ 135. Having a mere ideal existence, a corporation, as such, cannot do any personal act: it cannot take care, nor neglect to take care. When, therefore, a corporation is said to be guilty of negligence, we mean that its officers, agents or servants, acting within the scope of their authority and on behalf of the corporation, have neglected to do something which they were bound to do, or have, on the other hand, done some wrongful or improper act. The rules of law governing the relation of master and servant, and principal and agent, are as applicable to corporations as to natural persons; and a municipal corporation is lia-

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repair, and the corporation was liable to one injured by reason of the defective condition of the street (*Clark v. Lockport*, 49 Barb. 580).

<sup>1</sup> *Hickok v. Plattsburgh*, 16 N. Y. 161, *note*; reversing S. C., 15 Barb. 427.

<sup>2</sup> *Ib. post*, § 149.

<sup>3</sup> *Erie City v. Schwingle*, 22 Penn. St. 384; *Wendell v. Troy*, 39 Barb. 329, 338.

ble for the carelessness or neglect of its agents, on the same principle that a natural person is liable for damages resulting from the carelessness, unskillfulness, or wrongdoing of his agents.<sup>1</sup> Negligence in the selection of an agent or servant cannot be imputed to the sovereign or state,<sup>2</sup> but may be imputed to a municipal corporation.<sup>3</sup>

§ 136. The liability of the corporation for an *omission* to do an act depends, as we have seen,<sup>4</sup> on the extent to which it is its duty to cause that act to be done; but where this duty appears, a corporation is liable for a failure to perform it, just as much as any private citizen. When a corporation is bound to do a certain thing, it is no excuse for it to say that its officers, servants, or agents, whose duty it was to do the thing, or who were duly directed by it to do it, have neglected their duty, and left the thing undone.<sup>5</sup> Nor will it do for the corporation to

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<sup>1</sup> Corporations are liable, by the common law, in the actions of trespass, trover, trespass upon the case *ex delicto*, &c., for torts commanded or authorized by them; and for this purpose, as well as in matters of contract, the acts of their agents are regarded as the acts of the corporation (*Hawkins v. Dutchess & Orange Steamboat Co.*, 2 Wend. 452; *M'Cready v. Guardians of the Poor*, 9 Serg. & R. 94; *Lyman v. White River Bridge Co.*, 2 Aik. 255; *Dater v. Troy Turnpike & R. Co.*, 2 Hill, 629; *Goodloe v. Cincinnati*, 4 Ohio, 500, 514; *Hamilton Co. v. Cincinnati &c. Turnpike*, *Wright [Ohio]*, 603; *Chestnut Hill Turnpike v. Rutter*, 4 Serg. & R. 16; *Kneass v. Schuylkill Bank*, 4 Wash. C. C. 106; *Riddle v. Proprietors of Locks & Canals*, 7 Mass. 187; *Beach v. Fulton Bank*, 7 Cow. 485; *Fowle v. Alexandria*, 3 Peters, 409; *Bushel v. Commonwealth Ins. Co.*, 15 Serg. & R. 173; *Gray v. Portland Bank*, 3 Mass. 385; *Waring v. Catawba Co.*, 2 Bay, 109; *Albert v. Savings Bank of Baltimore*, 1 Maryl. Ch. Dec. 407; *Thatcher v. Bank of New York*, 5 Sandf. 121; *Life & Fire Ins. Co. v. Mechanics Fire Ins. Co.*, 7 Wend. 35; *Bank Commissioners v. Bank of Buffalo*, 6 Paige, 497; *Ward v. Sea Ins. Co.*, 7 Id. 294. See *Angell & A. on Corp.*, § 311; *ante*, § 119).

<sup>2</sup> *Per Johnson, J.*, *Fish v. Dodge*, 38 Barb. 172.

<sup>3</sup> *Lloyd v. Mayor &c. of New York*, 5 N. Y. 369, 371. *Per Ingraham, J.*: "Where gross negligence in discharging the duty is proved, the presumption is strong that the agent employed was an improper one." And see *Templin v. Iowa City*, 14 Iowa, 296; *Wallace v. Muscatine*, 4 Greene, 373; *Ross v. Madison*, 1 Ind. 281; *Cotes v. Davenport*, 9 Iowa, 227, and cases *supra*.

<sup>4</sup> *Ante*, § 123.

<sup>5</sup> *Mayor &c. of New York v. Furze*, 3 Hill, 612, 618; *Martin v. Brooklyn*, 1 Id. 545; *Chicago v. Major*, 18 Ill. 349; *Scott v. Manchester*, 2 Hurlst. & N. 204; *aff'd* 1 Id. 59.

say that it has contracted for the performance of the work with a competent person, who has broken his contract.<sup>1</sup>

§ 137. A municipal corporation, unless exempted by statute,<sup>2</sup> is responsible for the acts and omissions of its servants upon the same principle, and to the same extent, as a private individual.<sup>3</sup> In accordance with the rules heretofore stated, in the chapter on the LIABILITY OF MASTERS FOR SERVANTS, it is necessary, in order to make a corporation liable for the negligence of an officer, that the officer should be appointed and removable by the corporation,<sup>4</sup> and subject to its control in the details of the particular work.<sup>5</sup> Where an affirmative act is complained of, it must appear to be within the scope of the actual or ostensible authority of the officer, and within the power of the corporation itself.<sup>6</sup> Where these facts concur, it will

<sup>1</sup> *Storrs v. Utica*, 17 N. Y. 104; *St. Paul v. Seitz*, 3 Minn. 297. See *ante*, § 83; and *post*, § 142.

<sup>2</sup> The legislature has power to exempt a municipal corporation from liability for any non-feasance or misfeasance of the city officers (*Gray v. Brooklyn*, 50 Barb. 365). So the city of San Francisco, by the statute of 1856, § 64, is released from liability on account of injuries received through non-repair of its highways (*Parsons v. San Francisco*, 23 Cal. 462).

<sup>3</sup> *Per Hand*, *Senator, Mayor &c. of New York v. Bailey*, 2 Denio, 448; *Scott v. Manchester*, 2 H. & N. 204. Municipal corporations, acting under a power conferred upon them by the legislature in the exercise of a special franchise granted to them—*e. g.*, the establishment of a lottery—are responsible for the acts and contracts of their agents, duly appointed and authorized, within the scope of the authority of such agents (*Clark v. Washington*, 12 Wheat. 40).

<sup>4</sup> *Lloyd v. Mayor &c. of New York*, 5 N. Y. 369; *Schinotti v. Bumstead*, 6 T. R. 646; *Clark v. Washington*, 12 Wheat. 40; *Moodalay v. East India Co.*, 1 Bro. C. C. 469; *Martin v. Brooklyn*, 1 Hill, 545. A municipal corporation, employing workmen to lay down gas-pipes in the borough, is liable for the negligence of the persons so employed (*Scott v. Manchester*, 1 Hurlst. & N. 59; 2 Id. 204).

<sup>5</sup> *Ante*, § 79; *post*, § 141. Hence a city is not liable for an injury caused by the negligence of a teamster employed by its superintendent of streets in transporting materials for the repair of a highway (*Barney v. Lowell*, 98 Mass. 570).

<sup>6</sup> This is an indispensable condition (*Poulton v. London & Southw. R. Co.*, Law Rep. 2 Q. B. 534). *Boom v. Utica* (2 Barb. 104), was an action of trespass on the case for a forcible seizure by a health board of the plaintiff's house, and its occupation as a pest house, without his consent and against his will. It was held that, as the city had no authority under its charter to order the seizure, it could not be held

be liable, just as if it were an individual. And a corporation is liable for acts, within the scope of its powers, which are done by persons who are not strictly its officers, but who in those matters act under its precedent authority or subsequent ratification.<sup>1</sup>

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liable for the acts of its officers in the seizure, notwithstanding its subsequent ratification of the act. In *Boylard v. Mayor &c. of New York* (1 Sandf. 27), the plaintiff, while passing through a park at the time that a public meeting was being held at the call of the corporation to consider national affairs, was injured by the discharge of a cannon fired by some person there. Held, that the corporation was not liable for the injury. Calling a public meeting of the citizens for political or philanthropic purposes, was no part of the business of the corporation. If it were otherwise, the persons who fired the gun must be shown to have done so as the agents of the corporation (and see *Morrison v. Lawrence*, 98 Mass. 219). The same principle applies in the case of contracts, and where a city was sued by a hotel-keeper for expenses incurred on a contract made by a committee authorized by resolution of the common council, "to co-operate with the citizens generally for making proper arrangements for celebrating the anniversary of our independence," it was held, that as the common council did not possess authority to furnish public entertainments, the city was not liable for the bill, though the dinner had been eaten. The court said: "It cannot be maintained that a corporation can, by a subsequent ratification, make good an act of its agent, which it could not have empowered him to do" (*Hodges v. Buffalo*, 2 Denio, 113; see *McCracken v. San Francisco*, 16 Cal. 591; *Kavanagh v. Brooklyn*, 38 Barb. 332; *Thayer v. Boston*, 19 Pick. 511; *Halstead v. Mayor &c. of New York*, 3 N. Y. 430; *Peterson v. Mayor &c. of New York*, 17 N. Y. 449; *Grogan v. San Francisco*, 18 Cal. 590; *Hanvey v. Rochester*, 35 Barb. 177; *Delafield v. Illinois*, 26 Wend. 192; 2 Hill, 159; *Richardson v. Crandall*, 47 Barb. 335). A town, in its corporate capacity, will not be bound, even by the express vote of the majority, to the performance of contracts, or other legal duties, not coming within the scope of the objects and purposes for which it was incorporated (*Stetson v. Kempton*, 13 Mass. 272; *Norton v. Mansfield*, 16 Mass. 48; *Parsons v. Goshen*, 11 Pick. 396; *Anthony v. Adams*, 1 Metc. 284). A municipal corporation cannot be held liable under a contract made by the municipal officers in violation of law (*Fox v. New Orleans*, 12 La. Ann. 154; *Seibrecht v. New Orleans*, Id. 496).

<sup>1</sup> But this adoption must be voluntary and unequivocal. In *Bailey v. Mayor &c. of New York* (3 Hill, 531), it appeared that certain commissioners were appointed by the state to draft a plan for conveying water into the city of New York, such plans to be submitted to the common council of the city for their approval and adoption. The plan submitted by the commissioners was approved, and the commissioners were instructed by the common council to proceed with the work, which was accordingly done. The work was paid for, and accepted by the city. In the course of the work a dam across Croton river was necessarily, but so negligently built, that during a freshet it was carried away, causing injury to the plaintiff's property. On the trial the plaintiff was nonsuited, principally upon the ground that the water commissioners having been appointed by the state, were not subject to the control of the city, and that the latter was not, therefore, liable for their negligence. On appeal to the Supreme Court, Nelson, Ch. J., delivering the opinion of the court, a new trial was

§ 138. On the other hand, where the corporation has no choice in the selection of an officer, but is bound to

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granted on the ground that "the undertaking of the work was made to depend upon the approval of the plan of the commissioners, which necessarily involved the right to adopt or reject the work altogether, if they disliked the system prescribed by the legislature. This approval," the court adds, "having taken place together with the subsequent measures of the common council instructing the commissioners to proceed in the execution of the work, constituted them the agents of the defendant as effectually as if the latter had originally appointed them. The act of adoption in the one case was as free and voluntary as the appointment in the other." But this view was, on appeal to the Court of Errors, wholly repudiated, and the liability of the city was placed upon an entirely different ground. Gardiner, president, said: "At the common law, where an agency exists, the principal becomes responsible for the acts of his agent, because he has the right to employ and the authority to control him. Where the right of employment and the authority to control are both wanting, no agency can exist; for the acts of the agent cannot in such a case, upon the principles of common law or common sense, become the acts of the principal. Employment, however, implies the right of selection from the community at large, or, at least, from a particular class. But this statute gives both the selection and appointment of these commissioners to the state, and, in the discharge of all their duties, in effect declares them irresponsible to and independent of the corporation. They cannot be removed, controlled, or even advised by their supposed principals. Whatever the relation between these parties may be, it would be preposterous to treat it as a common law agency. The commissioners, it is true, have certain duties to perform for the benefit of the inhabitants of the city of New York, or of the corporation; but these duties are performed under the authority of the law of the state, and not under the corporation. \* \* \* The common council had the right to approve or disapprove of the plan adopted by the commissioners; but that surely did not include the right to reject that report because they disapproved of the law, or of the agent by whom it was to be executed. They had accepted the law, as we have seen, immediately upon its passage. They had provided for the payment of the commissioners, and thus acquiesced in and acted under the law. The report and plan were laid before them. The only question for the consideration of the common council was whether the plan of the work presented by the commissioners was such as they could approve. If the plan, as such, was unobjectionable, they could not reject it without being guilty of official perjury." The Chancellor said: "I have great difficulty in bringing my mind to the conclusion that the relation of master and servant, or of principal and agent, existed in this case between the corporation and the engineer and others employed in the construction of this dam, so as to render such corporation liable, on that ground, for negligence which had occurred in such construction. The water commissioners were not appointed by the corporation, nor were they subject to its direction or control in any respect, after it had once signified its will that the work should proceed. Neither had the corporation any right to interfere in the appointment or in the removal of the engineers and others who were employed in the construction of the work, nor even to withhold the payment of their wages out of the fund provided by law for such payment. It is true, the corporation may be said to have set the water commissioners, first appointed by the governor and senate, in motion, by directing them to proceed and execute the work according to the provisions of the statute. But something more

appoint a particular person, or accept the services of an independent officer, who derives his authority and duties from another source than itself, or whose duties are specifically imposed by statute, it is not liable for his acts. Thus, a municipal corporation is not answerable for the acts or omissions of officers who are directly elected by the people,<sup>1</sup> or who are appointed by the state, though acting for the benefit of the corporation,<sup>2</sup> or upon whom, as such officer, the statute has enjoined the performance of a specific duty.<sup>3</sup> If, however, the corporation specific-

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than that is necessary to constitute the relation of principal and agent, or master and servant, between those parties." The assumption by the corporation of the defense of one of its officers, will not render it liable for his default (*Buttrick v. Lowell*, 1 Allen, 172; *Rounds v. Bangor*, 46 Me. 541). And see *Smith v. Birmingham & S. Gas Co.* (1 Md. & El. 526); where it was held that from the corporation having received the proceeds of a distress, the jury might infer an adoption by it of the act of its officers in making the distress. And see other cases cited in *Angell & Ames on Corporations*, § 311, *note*.

<sup>1</sup> *Terry v. Mayor &c. of New York*, 8 Bosw. 504; *Treadwell v. Mayor &c. of New York*, 1 Daly, 123. A city corporation is not responsible to a lot-owner for damages resulting from negligence on the part of a district surveyor, in locating the line of his lots, so that, after a partial construction of a house, he was compelled to rebuild it; because that officer being elected directly by the people, under the authority of a statute, the corporation has no control over him, and is not bound by any of his acts (*Alcorn v. Philadelphia*, 44 Penn. St. 348).

<sup>2</sup> *Mayor &c. of New York v. Bailey*, 2 Denio, 433; 3 Hill, 531; see *Lloyd v. Mayor &c. of New York*, 5 N. Y. 371. But the fact that officers thus appointed are specially charged by law with the enforcement of corporation ordinances, is no excuse for the neglect of the corporation to enforce them, so long as it has any other means of securing obedience thereto (*Reinhard v. Mayor &c. of N. Y.*, 2 Daly, 243).

<sup>3</sup> *Commissioners &c. v. Duckett*, 20 Md. 468; *Martin v. Brooklyn*, 1 Hill, 545. In this case, the officer was appointed by the corporation, but was not removable by it. Cowen, J., said: "In this respect the officers are *quasi* civil officers of the government, though appointed by the corporation. The relation of master and servant does not exist between the corporation and officers." The assessors and collector are not in any legal sense the agents of the town, in its corporate capacity, in the assessment and collection of taxes, and the town is not responsible for any mistake or misfeasance by them in the performance of their duties (*Lorillard v. Monroe*, 11 N. Y. 392). But it has been held in Illinois that a city is liable to an action on case by a party whose property has been taken, for failing to assess other parties (*Clayburgh v. Chicago*, 25 Ill. 535). A city or town is not liable for the wrongful acts of one acting as pound-keeper, but who has never qualified by giving bonds as required by law (*Rounds v. Bangor*, 46 Maine, 541). In *Ogilvie v. Magistrates of Edinburgh* (Hay, 26; F. C. 1821), it appeared that the magistrates of Edinburgh appoint or license pilots on their application, accompanied by certain certificates of qualification. They receive, how-

ally directs an independent officer to do a certain thing, or specifically adopts, accepts, and ratifies his acts, it would seem that, *quoad hoc*, the officer loses his independent character, and becomes an ordinary servant of the corporation, for whose acts, like the acts of its other servants, it is answerable.<sup>1</sup> The mere granting of a license, by a municipal corporation, to a plumber to make and connect service pipes for conducting water from the distributing pipes of the city to private houses, or the giving of a special permit to him, to connect with a city sewer, under the direction of the city inspectors, does not make the plumber an officer or servant of the city when employed by, and working for, private parties.<sup>2</sup>

§ 139. The members of an independently incorporated department of the city government, although appointed and removable by and under the control and pay of the city, have been held not to be the servants of the latter. Thus, where the firemen of a city were incorporated, with the primary object of providing for the relief of such of them as should be disabled or indigent, but the appointment, removal, and control of the firemen was vested in the common council, by which, also, their apparatus was furnished, it was held that the duties of such firemen, and the powers exercised by the city in reference to them, were conferred and employed exclusively for the public benefit, and not for the benefit of the city corporation, and that, therefore, the latter was not liable for the

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ever, no part of the dues of pilotage. A ship having been damaged by running ashore on a sand-bank while under the charge of a pilot, and an action being brought by the underwriters against the magistrates, as responsible for the negligence of the pilots, it was held that the defendants were not liable in damages.

<sup>1</sup> Contractors with a municipal corporation are not required to do more than their contract requires. If an injury to a third person results from an act which the corporation by the contract directs to be done, the rule *respondet superior* applies (*Lockwood v. Mayor &c. of New York*, 2 Hilt. 66).

<sup>2</sup> *Dorlon v. Brooklyn*, 46 Barb. 604.



negligence or wrongful acts of the firemen.<sup>1</sup> Police officers are held not to be public officers within the rule making the corporation answerable for their acts.<sup>2</sup>

§ 140. A municipal corporation is not answerable for the illegal and wrongful acts of its officers, though done *colore officii*,<sup>3</sup> notwithstanding they were done by its specific direction,<sup>4</sup> or were afterward approved of and ratified by

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<sup>1</sup> O'Meara v. Mayor &c. of New York (1 Daly, 425). Brady, J., in speaking of the fire department, said: "Its members owe their allegiance to the city not as members of the corporation, but as members of an organization identified with the administration of the city government, and forming a part of its protective police." In this case the plaintiff while standing on the sidewalk, was knocked down and run over by a fire engine while in charge of firemen. It was held that the city was not answerable. The mere fact that the firemen had at the time an engine in their possession, by the authority of the common council, did not create the relation of master and servant. In Van Wert v. Brooklyn (28 How. Pr. 451), the plaintiff was the owner of a house and lot adjoining an engine-house. The members of the engine company were having another story put on the building which they occupied, and, before the walls were finished, one of them was blown over, falling on the roof of the plaintiff's house, and injuring the same. The additional story was being put on at the expense of the fire company, and without permission of the city. Held, that the city was not liable, because neither the fire company, nor the builders who erected the walls, could be considered its agents or employees in building it.

<sup>2</sup> Thus, in Massachusetts, it has been held that a police officer is not a servant of the city which appoints him, in such a sense as to prevent his maintaining an action against it for injuries sustained by him by reason of a defective highway (Kimball v. Boston, 1 Allen, 417); and in another case, it was said "police officers can in no sense be regarded as agents or servants of the city. Their appointment is devolved on cities and towns by the legislature; but this does not render them liable for their unlawful or negligent acts. For the mode in which they exercise their powers and duties, the city or town cannot be held liable" (Buttrick v. Lowell, 1 Allen, 172). A municipal corporation is not liable for the nonfeasance or misfeasance of the officers of the police jail (Stewart v. New Orleans, 9 La. Ann. 461; Lewis v. New Orleans, 12 La. Ann. 190). A municipal corporation, having authority to pass ordinances forbidding slaves to be abroad at night, or to assemble together without lawful permission, was held not liable, at the suit of the owner, for the loss of a slave who was negligently killed, by an officer of the city guard, in attempting to arrest him for a breach of such ordinance (Dargan v. Mobile, 31 Ala. [N. S.] 469).

<sup>3</sup> Boom v. Utica, 2 Barb. 104; Hazelton Canal Co. v. Megaral, 4 Penn. St. 324; Vanderbilt v. Richmond Turnpike Co., 2 N. Y. 479; see Rhodes v. Cleveland, 10 Ohio, 159; Clark v. Des Moines, 19 Iowa, 198. A city corporation is not liable for the willful acts of its marshal, not done by its direction (Ready v. Tuscaloosa, 9 Ala. 327).

<sup>4</sup> Hanvey v. Rochester, 35 Barb. 177.

it;<sup>1</sup> for, in directing the doing of such acts, or in ratifying them when done, the corporation acts *ultra vires*.<sup>2</sup> But the corporation is liable for the *irregular* and illegal exercise, by its authorized agents, of a power which the corporation possesses,<sup>3</sup> as where an officer levied and collected from the plaintiff a sum imposed by a void assessment, the corporation having had authority to levy the assessment in a regular way,<sup>4</sup> or where a common council, having authority to grade a street on obtaining the consent of two-thirds of the adjacent owners, failed to obtain such consent, but directed the work to be done nevertheless, whereby the plaintiff was injured.<sup>5</sup>

§ 141. In general, a public officer can appoint a deputy only when specially authorized so to do, particularly where the duties of the office involve trust, skill, and confidence.<sup>6</sup> But if an officer has authority to appoint subordinates, or if the nature of the duties of the office requires such appointment, the persons appointed by him become public servants equally with the superior officer, and the rules of law already stated in reference to the liability of a prin-

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<sup>1</sup> *Hodges v. Buffalo*, 2 Denio, 113; *Delafield v. Illinois*, 26 Wend. 192; 2 Hill, 159.

<sup>2</sup> *Ib.* Compare *Thayer v. Baston*, 19 Pick. 511; *Dargan v. Mobile*, 31 Ala. [N. S.] 469; *Pesterfield v. Vickers*, 3 Coldw. 205; *State v. Buffalo*, 2 Hill, 434.

<sup>3</sup> *Howell v. Buffalo*, 15 N. Y. 512; and see *Wilde v. New Orleans*, 12 La. Ann. 15; *Soulard v. St. Lewis*, 36 Mo. 546; *Hildreth v. Lowell*, 11 Gray, 345; *Wallace v. Muscatine*, 4 Greene, 373; *McCombs v. Akron*, 15 Ohio, 474; *Pekin v. Newell*, 36 Ill. 320.

<sup>4</sup> *Howell v. Buffalo*, 15 N. Y. 512.

<sup>5</sup> *Leman v. Mayor &c. of New York*, 5 Bosw. 414.

<sup>6</sup> *Earl of Shrewsbury's Case*, 9 Co. 48, 49; *State v. Buffalo*, 2 Hill, 434. An authority to do acts merely ministerial or mechanical may, it seems, be delegated; but not so where the act involves the exercise of judgment or discretion (*Powell v. Tuttle*, 3 N. Y. 396; *Sherwood v. Reade*, 7 Hill, 431; *Striker v. Kelly*, *Id.* 9; 2 Den. 323; *Sharp v. Spier*, 4 Hill, 76; *Downing v. Ruger*, 21 Wend. 178). So, as to private agency, the general principle is *delegatus non potest delegare* (*Doe v. Robinson*, 3 Bing. N. C. 677; *Clark v. Dignum*, 3 Mees. & W. 319; *Ess v. Truscott*, 2 Id. 385; *Solly v. Rathbone*, 2 Maule & Sel. 298; and see *Moor v. Wilson*, 6 Foster, 332; *Williams v. Woods*, 16 Md. 220; *Commercial Bank v. Union Bank*, 11 N. Y. 283).

cipal for the acts of sub-agents<sup>1</sup> are entirely applicable to them. Thus a municipal corporation is liable for injuries caused by the carelessness of the laborers employed by its street commissioner, or other proper officer, in the construction of a public street.<sup>2</sup> In Massachusetts, however, under the statute of that state prescribing the liabilities of towns, it has been held that a town is not liable for an injury sustained by reason of the neglect of a laborer employed by one of its highway surveyors to aid him in performing the duties of his office.<sup>3</sup> A contractor with a municipal corporation not being a public officer, it follows that the servants employed by him upon a public work do not become public servants by virtue of such employment. They are solely the servants of the contractor, who alone is responsible for their misconduct.<sup>4</sup>

§ 142. We have already seen<sup>5</sup> that an independent contractor is not, in a legal sense, the servant or agent of his employer in relation to anything but the specific results which necessarily follow the execution of the work itself, and that the employer, therefore, is in no way responsible for the careless or faulty manner in which the work is done. The rule is as applicable to corporations as to natural persons. If a city corporation undertakes, for example, the building of a sewer under a public street, and it is a necessary result of the undertaking that an excavation be made in the street, such an interference with a public highway is, *per se*, a public nuisance. If such an

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<sup>1</sup> *Ante*, §§ 70, 80-82.

<sup>2</sup> *Delmonico v. Mayor &c. of New York*, 1 Sandf. 222; *Dayton v. Pease*, 4 Ohio St. 80; *Smith v. Milwaukee*, 18 Wisc. 63; see *Memphis v. Lasser*, 9 Humph. 757; *Detroit v. Corey*, 9 Mich. 165; *Cincinnati v. Stone*, 5 Ohio St. 38; *Meares v. Wilmington*, 9 Ired. [N. C.] Law, 73.

<sup>3</sup> *Walcott v. Swampscott*, 1 Allen, 101; *Barney v. Lowell*, 98 Mass. 570.

<sup>4</sup> See *ante*, § 81; *post*, § 142.

<sup>5</sup> *Ante*, § 81.

excavation is inadequately protected, so that a traveler, without fault on his part, falls into it and is injured, he has his remedy against the corporation which set the work in motion.<sup>1</sup> But if, in the prosecution of the work, the blasting of rocks being necessary, the contractor or his employees so negligently conduct the blasting that a stone is thrown against a traveler, it would be manifestly unjust to look to the corporation for indemnity, for the corporation had nothing to do with the manner of doing the work.<sup>2</sup> Nor is the rule modified by the fact that there is a clause in the contract by which the contractor engages to conform the work to such further directions as may be given by the corporation, or to do the work to the satisfaction of certain officers of the corporation. The object of such a clause is to give the corporation power to prescribe what shall be done, not how it should be done, or by whom.<sup>3</sup> The corporation cannot recover from the contractor damages which it has been compelled to pay to a person suffering injuries by reason of the contractor's neglect to guard against accidents while prosecuting a public work, unless the contract bound him to do so.<sup>4</sup>

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<sup>1</sup> *Storrs v. Utica*, 17 N. Y. 104; see *St. Paul v. Seitz*, 3 Minn. 297; *James v. San Francisco*, 6 Cal. 528; *Chicago v. Robbins*, 2 Black, 418. Where work done on a public highway necessarily causes an obstruction or defect in it, it is no defense to a claim against the person causing such work to be done, by a municipal corporation which has had to pay damages for injuries done to a passer-by from such obstructions or defect, that the defect was caused by an independent contractor (*Robbins v. Chicago*, 4 Wallace, 657). But a municipal corporation, as owner of real property, is not liable for injuries caused by negligence in the construction of a public work thereon, if such work was done under a contract duly executed by its proper authorities, unless it affirmatively appears that in making the contract for its execution some improper act was required to be done, or some ordinary or proper precaution was improperly omitted (*Van Wert v. Brooklyn*, 28 How. Pr. 451).

<sup>2</sup> *Pack v. Mayor &c. of New York*, 8 N. Y. 222; *Kelly v. Mayor &c. of New York*, 11 Id. 432; reversing S. C., 4 E. D. Smith, 291.

<sup>3</sup> *Ib.*

<sup>4</sup> *Buffalo v. Holloway*, 7 N. Y. 493; affirming S. C., 14 Barb. 101. In that case a person was injured by falling into a public sewer in course of construction by a contractor, and by him left unguarded. Held, that unless the contract imposed upon the contractor the duty of putting up barriers, &c., and protecting passengers

§ 143. The responsibility of municipal corporations for the safe condition of the highways within their limits, has been already alluded to.<sup>1</sup> The same principles apply in the case of bridges, sewers, wharves, and all other public structures and places which are under the care and control of the corporation. As to these subjects, negligence may consist either (1) in their original faulty and unskillful construction, or (2) in their subsequent improper maintenance or unsafe condition by reason of want of repair, or the existence of obstructions.

§ 144. In regard to the *construction* of public works, the general rule is that, while the question whether or not the work itself shall be done is discretionary, yet if the corporation undertakes its execution, it is bound to exercise that care and prudence which a discreet and cautious individual would or ought to use, if the whole loss or risk were to be his own.<sup>2</sup> In other words, the exercise of ordinary care and skill is required, and is all that can be required,<sup>3</sup> either in the plan to be adopted,<sup>4</sup> or in the manner

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against injury by accident, no action lay. Otherwise it was the duty of the city to do this and it was their neglect that it was not done.

<sup>1</sup> *Ante*, § 133; and see *post*, § 149.

<sup>2</sup> *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; *Lacour v. Mayor &c. of New York*, 3 Duer, 406; *Mayor &c. of New York v. Bailey*, 2 Denio, 433; in which case the Chancellor says, in speaking of this rule: "The degree of care and foresight which it is necessary to use in cases of this description, must always be in proportion to the nature and magnitude of the injury that will be likely to result from the occurrence which is to be anticipated and guarded against." See also *Conrad v. Ithaca*, 16 N. Y. 168; *Montgomery v. Gilmer*, 33 Ala. [N. S.] 116; *Delmonico v. Mayor &c. of New York*, 1 Sandf. 222; *Scott v. Manchester*, 1 Hurlst. & N. 59; 2 Id. 204; *Smoot v. Wetumpka*, 24 Ala. [N. S.] 112; *Weightman v. Washington*, 1 Black, 39; *Duke v. Rome*, 20 Geo. 635; *Martin v. Brooklyn*, 1 Hill, 545; *Parker v. Lowell*, 11 Gray, 353; *Hall v. Smith*, 2 Bing. 156; see *Sutton v. Clarke*, 6 Taunt. 29; S. C., 1 Marshall, 429, and cases *infra*, §§ 149, 150.

<sup>3</sup> *Townsend v. Susquehanna Turnp. Co.*, 6 Johns. 90; *Richardson v. Royalton Turnp. Co.*, 5 Verm. 580; *Wilson v. Susquehanna Turnp.*, 21 Barb. 68; *Milwaukee v. Davis*, 6 Wisc. 377; see *Roberts v. Chicago*, 26 Ill. 249; *Madison v. Ross*, 2 Ind. 236.

<sup>4</sup> *Sutton v. Clarke*, 6 Taunt. 29; S. C., 1 Marshall, 429. But compare *Grote v. Chester & Holyhead R. Co.*, 2 Exch. 251; *Allen v. Hayward*, 7 Q. B. 960; *Weightman v. Washington*, 1 Black, 39.

in which that plan is carried out. Thus where a culvert, constructed by a city for the purpose of carrying off the water of a natural stream which had been the outlet to the surface-water of a portion of the city, was constructed of such insufficient capacity that, on the occurrence of a freshet it failed to discharge the waters, so that they were set back upon the plaintiff's premises, the city was held liable for the injuries thereby caused. Having undertaken to do the work, it was bound to see that it was skillfully done.<sup>1</sup>

§ 145. But whenever a statute gives express directions as to the plan on which a work is to be undertaken, the materials to be used, or other particulars, such directions must be strictly complied with. Non-compliance with the statutory requirement is a public nuisance, for which a party injured without fault on his part may recover damages,<sup>2</sup> without proof of any negligence. Thus a requirement to make a road of a specified width,<sup>3</sup> or an arch of a particular height<sup>4</sup> or angle,<sup>5</sup> &c., may be enforced by mandamus or injunction; and non-performance may be punished by indictment. It is no defense that the deviation better subserves the convenience of the public than the plan prescribed,<sup>6</sup> or that the substituted plan has been skillfully carried out.<sup>7</sup>

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<sup>1</sup> Rochester White Lead Co. v. Rochester, 3 N. Y. 463; Weightman v. Washington, 1 Black, 89.

<sup>2</sup> Wilson v. Susquehanna Turnp. Co., 21 Barb. 68. See Carron v. Martin, 2 Dutch. 594; Pekin v. Newell, 26 Ill. 320. In an indictment against commissioners for neglecting their duty in respect of keeping streets in repair, if they are only authorized to raise and lay out money in a particular manner, a general allegation that they refused and neglected to apply and expend the money in repairing is not sufficient (State v. Raleigh, 3 Jones [N.C.] Law, 399).

<sup>3</sup> Wilson v. Susquehanna Turnp. Co., 21 Barb. 68; Attorney-General v. Southampton R. Co., 9 Sim. 78; 1 Railw. Cas. 302; Regina v. Manchester & C. R. Co., 3 Q. B. 528.

<sup>4</sup> Regina v. Eastern Counties R. Co., 2 Q. B. 569.

<sup>5</sup> Regina v. Sharp, 3 Railw. Cas. 33.

<sup>6</sup> Hughes v. Providence & Worcester R. Co., 2 R. I. 493; Regina v. United Kingdom Elec. Tel. Co., 9 Cox C. C. 174; 3 Fost. & F. 73.

<sup>7</sup> See chapter on HIGHWAYS.

§ 146. The maintenance and repair of roads and bridges are in many of the states expressly imposed by statute upon the towns and cities in which they lie, and such towns and cities are made absolutely liable in damages for all injuries occasioned by any want of repair, or by any obstruction or defect of such highways.<sup>1</sup> Under such an absolute requirement, it is only necessary, in an action to recover for injuries occasioned by the defective condition of a highway, to prove the existence of the defect, and that the injury accrued therefrom.

§ 147. But in the absence of a statutory requirement thus absolute, a municipal corporation is not a general warrantor of the safe condition of the streets within its limits; and in such cases negligence must be affirmatively shown, and the mere existence in a highway of an obstruction or other defect is not enough to establish negligence in the corporation.<sup>3</sup> The corporation must in some way be connected with the defect, either as having directly caused it, or having assented to its creation by another,<sup>4</sup> or as having, with a knowledge of its existence, permitted it to remain.<sup>5</sup> Thus where a city corporation causes a sewer to be constructed in a public street, in the course of which an excavation is made, it is the duty of the corporation, as

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<sup>1</sup> See the chapter on HIGHWAYS.

<sup>2</sup> *Merrell v. Hampden*, 26 Maine, 234. In an action for damages for injury to plaintiff's horse for insufficiency and want of repair of a highway, the referees having found as facts in the case, that the road was insufficient, that the injury arose from that cause, and that there was no want of care and prudence in managing the team and load,—held, that plaintiff was entitled to judgment (*Howe v. Castleton*, 25 Verm. 162). Indeed, it seems that the existence of obstructions in a highway is such evidence of negligence as requires explanations from the municipality in order to escape liability for damages resulting therefrom (*Mayor &c. v. Sheffield*, 4 Wallace, 189).

<sup>3</sup> *McGinity v. Mayor &c. of New York*, 5 Duer, 674.

<sup>4</sup> *Hutson v. Mayor &c. of New York*, 9 N. Y. 163; *Mayor &c. of New York v. Furze*, 3 Hill, 612.

<sup>5</sup> *Hart v. Brooklyn*, 36 Barb. 226.

the originator of the excavation, to see that it is properly protected, and if, through neglect of this duty, a passer-by is injured, the corporation is liable in damages.<sup>1</sup> So, also, where a municipal corporation, by its common council or other officers, authorizes a private individual to interfere with a street, as to lay a drain,<sup>2</sup> or railroad track,<sup>3</sup> under or upon it, it is the duty of the corporation to supervise the work so undertaken, and a failure to do so is culpable negligence.<sup>4</sup>

§ 148. In any of the cases mentioned in the last section, the mere existence of the obstruction or defect is evidence of a neglect of corporate duty. But where the defect in a lawful<sup>5</sup> structure is *latent*, or is the work of a wrong-doer, either express notice of it must be brought home to the corporation, or the defect must be so notorious as to be evident to all who have any occasion to pass the place, or to observe the premises,<sup>6</sup> in which case the corporation is charged with constructive notice, being

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<sup>1</sup> *Storrs v. Utica*, 17 N. Y. 104; *Grant v. Brooklyn*, 41 Barb. 381. In that case, the plaintiff was passing along a public highway, in which a sewer was being opened, and in consequence of the want of any barrier or light around the work, he fell into a hole and was injured. Held, that the defendant was guilty of negligence, to which the plaintiff had not contributed, and was liable for the injuries occasioned thereby.

<sup>2</sup> *Wendell v. Troy*, 39 Barb. 329; affirmed, 4 Keyes, 261.

<sup>3</sup> *Hutson v. Mayor &c. of New York*, 9 N. Y. 163.

<sup>4</sup> In *Wendell v. Troy* (*supra*), the court said: "If such a work is for any reason *tolerated* by the public authorities, it is their duty to exercise a supervision over its construction and condition, and it is negligence and a breach of duty in them to omit such supervision." In *Hutson v. Mayor &c. (supra)*, a railroad company, with the assent of the common council, constructed a track of their road along a public street, in doing which a deep excavation had been made in the traveled part of the street, leaving only a narrow space for passage, which had become very dangerous in consequence of the wearing away of the earth by rains. It was suffered to remain in that state by the city authorities, and the plaintiff, who was driving past it, was overturned and injured. Held, that the city was liable.

<sup>5</sup> *Wendell v. Troy*, 39 Barb. 329; see *Congreve v. Morgan*, 5 Duer, 495.

<sup>6</sup> *Hart v. Brooklyn*, 36 Barb. 226; *McGinity v. Mayor &c. of New York*, 5 Duer, 674; *Mayor &c. v. Sheffield*, 4 Wallace, 189; *Cuthbert v. Appleton*, 22 Wisc. 642.



in fault for not knowing the fact. Thus, a municipal corporation, having neither actual nor constructive notice of the defect, is not liable for injuries caused by a latent defect in the covering of an opening in the sidewalk,<sup>1</sup> nor for an obstruction placed in the highway by a wrong-doer.<sup>2</sup> But where such a defect or obstruction is notorious, or has continued undisturbed for a time sufficient to charge the public authorities with constructive notice, the corporation is liable.<sup>3</sup>

§ 149. With the foregoing limitations, the general rule may, therefore, be stated to be, that a municipal corporation, charged with the duty of keeping its streets in repair and of exercising a general oversight in regard to their condition and safety, is bound to maintain them free from all defects or obstructions which, by the use of ordinary vigilance and care, it can detect and remove.<sup>4</sup> It makes

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<sup>1</sup> *Ib.*

<sup>2</sup> *Griffin v. Mayor &c. of New York*, 9 N. Y. 456.

<sup>3</sup> *Davenport v. Ruckman*, 10 Bosw. 20; affirmed, 37 N. Y. 568.

<sup>4</sup> *Wendell v. Troy*, 39 Barb. 329; affirmed, 4 Keyes, 261. In this case, the city corporation gave permission to an adjacent owner to construct a drain in a public street, under the supervision of the city commissioner. A short time after its construction, the plaintiff was passing over it in his wagon, when it caved in, and the plaintiff was badly injured. Judgment was obtained by the plaintiff. Hogeboom, J., laid down the following propositions as settled law in New York: "Where municipal corporations or individuals are charged, as in the case of streets and highways, with the duty of keeping them in repair, and exercising a general oversight in regard to their condition and safety, they, or the body they represent, are liable for all injuries happening by reason of their negligence. They are bound to keep the streets and highways in a proper state of repair, and free from all obstructions or defects in the road bed which vigilance and care can detect and remove; and this, whether or not the work or repairs are being done by a contractor under them, the negligence of whose servants causes the injury complained of. If supervision is exercised, but not to such an extent as is demanded by proper and reasonable care, nor so as to secure the safety of the traveling public, the corporation or person required to exercise such supervision is guilty of negligence, and the injuries arising from such lack of efficient supervision and care are injuries for which they are responsible. If the injury results from some inherent defect or vice in the unauthorized structure itself, or the mode of constructing it, so as not to be apparent even to a careful external observer, the public or public authorities are nevertheless liable: 1. Because the structure was, under any circumstances, unauthorized; and 2. Because the exercise of competent care and vig-

no difference whether the neglect to do so is willful or otherwise.<sup>1</sup> For illustrations of the liability of municipal corporations for the defective construction or improper maintenance of streets, the chapter on HIGHWAYS should be consulted.

§ 150. The foregoing rules apply also to the construction and maintenance of other public works, such as wharves,<sup>2</sup> bridges,<sup>3</sup> public parks, places, and buildings.<sup>4</sup> But to make a municipal corporation liable for the unsafe condition of public property, its custody and control of

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ilance would have avoided such defects in the structure or mode of construction as would result in injury to the traveling public." See *Hutson v. Mayor &c. of New York*, 9 N. Y. 163; *Conrad v. Ithaca*, 16 N. Y. 158; *Hickok v. Plattsburgh*, Id. 161, *note*; reversing S. C., 15 Barb. 427; *Weet v. Brockport*, Id.; *Storrs v. Utica*, 17 Id. 104; *Hyatt v. Rondout*, 44 Barb. 385; *Peck v. Batavia*, 32 Id. 634; *Clark v. Lockport*, 49 Id. 580; *Lloyd v. Mayor &c. of New York*, 5 N. Y. 369; *Mayor &c. of New York v. Furze*, 3 Hill. 612; *Browning v. Springfield*, 17 Ill. 143; *Grant v. Brooklyn*, 41 Barb. 381; *Rush v. Davenport*, 6 Iowa, 443; *Joliet v. Verley*, 35 Ill. 58, and cases cited *ante*, § 130. The corporation of New York is bound to keep the streets in repair, and the sidewalks as part of the streets; and, although, in the first instance, abutters are bound to lay a sidewalk, yet if they do not do so, the corporation will be liable for injuries resulting to a person (*Wallace v. Mayor &c. of New York*, 2 Hilton, 440). A municipal corporation, which has authority to grade the streets, is liable, in an action on the case, for any damages which may accrue to an individual, from having the work done in an unskillful and incautious manner (*Meares v. Wilmington*, 9 Ired. [N. C.] Law, 73). In a Scotch case, brought against the city of Edinburgh for injuries occasioned by defects in a highway, it was held that the action was well founded against the city, as it was liable for the smallest neglect of duty (*Innes v. Magistrates &c.*, Hay, 189; 1 M. 13). An allegation that the injury resulted from the unsafe and rotten condition of a bridge, which rendered it incapable of sustaining the usual burdens that were accustomed to pass over it, is sufficient, without alleging plaintiff's careful conduct, or that he could not pass through the street without crossing the bridge (*Smoot v. Wetumpka*, 24 Ala. 112).

<sup>1</sup> *Erie City v. Schwingle*, 22 Penn. St. 384; *Barry v. Lowell*, 8 Allen, 127.

<sup>2</sup> *Moody v. Mayor &c. of New York*, 43 Barb. 282. A municipal corporation owning wharves, &c., for which they charge dockage, are bound to keep them in repair; and, in an action for dockage, defendant may recoup his special damage from their neglect of this duty (*Buckbee v. Brown*, 21 Wend. 110).

<sup>3</sup> *Hyatt v. Rondout*, 44 Barb. 385.

<sup>4</sup> Public squares are *quasi* public ways (2 Bishop Crim. Law, § 1049). In *Henley v. Lyme Regis* (5 Bing. 91; 3 Barn. & Ad. 77; 1 Bing. N. C. 222), the defendants were made liable for the non-repair of a sea wall. In *Lynn v. Turner* (Cowp. 86), the defendants were made liable for non-repair of a creek.

the property must be shown. Thus, although the title of a public school building is vested in the corporation by which its price is paid, yet where the corporation can neither buy nor sell the land on which it is built, nor prescribe what kind of building shall be erected, nor what fixtures shall be placed therein, nor afterward control its use, or have custody of it, but all these matters are in the hands of an independent public body, such as a board of education, the corporation is not responsible for injuries resulting to an individual from defects in such building.<sup>1</sup>

§ 151. In reference to the obligation of a municipal corporation for the non-repair of a public sewer to the owners of land drained by it, some difference of opinion has been expressed. It is conceded that where a city

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<sup>1</sup> *Terry v. Mayor &c. of New York*, 8 Bosw. 504. The plaintiff in this case was the owner of certain leasehold premises which were injured by the flow of water upon them from a neighboring lot, which had in it a public school building, furnished with Croton water pipes, which leaked. It was contended by the plaintiff that the city corporation was liable for the injuries, as the creators, or as the continuers, of a nuisance resulting from defects in a public building, or that, as owners of the Croton Aqueduct, it was liable for defects in the lateral service pipes inserted in the main street pipes. But the court held, as to the first point, that the Board of Education, and not the corporation, were the erectors and custodians of the building; and, as to the second point, that the corporation was not liable for injuries which arise from defects in the lateral service pipes inserted by consumers of water in the main street pipes of the aqueduct. In reference to the last point, Robertson, J., says: "The defendants are no more liable for the results of imperfections in the construction [of lateral service pipes] than for those of vessels in which citizens might carry the water from the reservoirs, if they were public fountains. The defendants are public trustees of the water as an article of public consumption, and are bound to furnish it to all who desire to use it, under proper regulations, but they are not bound to supervise the insertion of service pipes, or superintend their fabrication, fitting, and preservation, except to prevent injury to their works. The water drawn through private service pipes becomes as much private property as though it had been sold, and the subsequent ill use of it by negligence or otherwise, to the injury of another, cannot make the defendants liable any more than if they had sold an axe with which trespasses had been committed by cutting timber on another person's ground." To the same effect is *Treadwell v. Mayor &c. of New York* (1 Daly, 123). And see *Bigelow v. Randolph* (14 Gray, 541). The plaintiff was severely injured by the fall of a bridge which had been built by defendant, but the care of which had, before the injury, passed into other hands. The defendant was held not liable (*Mayor &c. of Albany v. Cunliff*, 2 N. Y. 165).

ordinance requires all the particular drains from private estates to pass into the main and common sewer of the city, one who complies with such ordinance has a right to demand from the city the exercise of ordinary vigilance and care in keeping the main sewer open and free from obstruction.<sup>1</sup> But where adjacent owners are not required to conform their drainage to that which the city has provided for public purposes, and have not, in fact, made use of the common sewer in that way, and have taken no means to prevent the overflow of water from it on their open land, they cannot complain of the failure of the city to keep its own works in repair.<sup>2</sup> The true rule undoubtedly is that a municipal corporation, having constructed a public sewer, is bound to maintain it in repair and free from obstructions. The owners of adjacent lots have a clear right to connect their premises with it, and if in consequence of an obstruction, water is set back through the under-drain of an individual upon his premises, the city is liable for the damages.<sup>3</sup> This rule, we think, commends

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<sup>1</sup> *Child v. Boston*, 4 Allen, 41. "As the city assumes to regulate the whole subject and compels all inhabitants to conform to and comply with their ordinances, it results, by necessary implication, that they make themselves liable for whatever mischief or injury necessarily results from any negligence or omission of duty on their part" (Ib.)

<sup>2</sup> *Barry v. Lowell*, 8 Allen, 127; *Flagg v. Worcester*, 13 Gray, 601. And see *Mills v. Brooklyn*, 32 N. Y. 489.

<sup>3</sup> *Mayor &c. of New York v. Furze*, 3 Hill, 612; *Barton v. Syracuse*, 36 N. Y. 54; affirming 37 Barb. 292. In the last case, it was claimed that the plaintiff was a wrong-doer in connecting his cellar and premises with the sewer by a drain, and that he was not, therefore, entitled to recover in the action. "But," said the court below, "sewers are constructed mainly in reference to a more thorough drainage than can be obtained in any other way, not only of the streets, but of the adjoining lots, and with a view to health as well as the more convenient enjoyment of the premises drained. \* \* \* If the public cannot use them for the purpose of drainage, they will not accomplish the end for which they were designed. \* \* \* There is something very like a contract to be implied from the construction of a sewer, at the expense of the adjacent property, that it may be used to drain the property thus charged with its construction." So, in Iowa, for any neglect to keep a sewer in repair after completion, or to complete it in a proper manner when begun, an action will lie in behalf of any party specially injured; and, if a nuisance is permitted or created, an indictment will lie (*Wallace v. Muscatine*, 4 Greene, 373).

itself as good sense and good law, although a contrary doctrine has been laid down in Michigan.<sup>1</sup> In Massachusetts, if a municipal corporation negligently suffers a natural water-course, running under a highway, to become obstructed, it is liable for the injuries thereby occasioned to the owner of the adjacent land.<sup>2</sup>

§ 152. In regard to the *use* of its corporate property, a municipal corporation is bound to an observance of the same rules which the law imposes upon individuals.<sup>3</sup> It is therefore bound to so use its own as not to injure another.<sup>4</sup> It is responsible, to the same extent as an individual would be under the same circumstances, for the creation

<sup>1</sup> In Michigan, in the case of *Dermont v. Detroit* (4 Mich. 435), it has been held that a city corporation is not liable, at the suit of a private individual, for damages arising from the insufficiency or defective construction of its public sewers, when such damages result directly from the use or occupation of the same for private advantage and convenience, notwithstanding the injured party, under an agreement, paid a sum annually for leave to cut a drain from his premises into the common sewer. The payment of a sum, annually, was held to be evidence of a license only, and not of an undertaking and guaranty on the part of the city to furnish ample drainage for the premises.

<sup>2</sup> *Parker v. Lowell*, 11 Gray, 353.

<sup>3</sup> *Brower v. Mayor &c. of New York*, 3 Barb. 254. "The citizen and the municipal body, in respect to their several possessions of real estate, stand upon a footing of equality; neither is a privileged owner, and each must fulfill the same duties in respect to the other." And see *Stein v. Burden*, 24 Ala. [N. S.] 130.

<sup>4</sup> The defendants, a body corporate, erected baths and wash-houses under the provisions of a statute which vested the property in the baths and wash-houses in the corporation, but their management in the town council. For the purpose of drying clothes, there was a wringing-machine, which consisted of a cylinder, into which the wet clothes were put, and which was made to revolve with great rapidity by steam power. This machine was originally constructed to be worked by hand by means of an ordinary winch-handle. In applying steam-power, this handle was removed, but an iron rod, to which it had been affixed, was unnecessarily allowed to remain. The plaintiff, who had paid for permission to wash, was using this machine, when the iron rod caught the sleeve of her gown, and she was dragged toward the machine and severely injured, without any negligence on her part. When it was proposed to apply steam-power to the machine, the defendants were told of its danger. Held, that the defendants, by availing themselves of the provisions of 9 & 10 Vict. c. 74, had undertaken a statutory duty, which bound them to exercise ordinary care and diligence in providing machines reasonably safe for use, and that they, and not the town council, were liable for the injury sustained by the plaintiff (*Cowley v. Sunderland*, 6 Hurlst. & N. 565. Compare *Bennett v. New Orleans*, 14 La. Ann. 120.)

and maintenance of a public nuisance, and is liable to a public prosecution, or to a private action at the suit of any one specially injured thereby. And the courts will interfere, by injunction, to prevent its creating a nuisance.<sup>1</sup>

§ 153. A municipal corporation is not liable in damages for the want of adequate administrative ordinances, nor for the manner in which its ordinances are executed.<sup>2</sup>

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<sup>1</sup> Thus, where one county was proceeding to repair a bridge over a river, dividing two counties, in such a manner as to create a nuisance, unless the other county proceeded in a particular manner with the repairs on their side, an injunction was granted; and it was held, that the surveyor and contractors, under the circumstances, were properly made parties (*Attorney-General v. Forbes*, 2 Myl. & Cr. 123; *Brower v. Mayor &c. of New York*, 3 Barb. 254. But see *McMahar v. Council Bluffs*, 12 Iowa, 112).

<sup>2</sup> *Griffin v. Mayor &c. of New York*, 9 N. Y. 456. A street, opposite to a building in process of erection, was so encroached upon by piles of rubbish and materials, that only sufficient room was left for one vehicle to pass. The plaintiff, in passing, was accidentally driven against the rubbish and overturned, by which he was injured. The city was held not liable. Denio, J., said: "The wrong complained of in this case arose either from the want of suitable municipal regulations or from some negligence in the city officers in ascertaining the existence of the obstruction or seasonably applying the proper remedy. A doctrine which should hold the city pecuniarily liable in such a case, would oblige its treasury to make good to every citizen any loss which he might sustain for the want of adequate laws upon every subject of municipal jurisdiction, and on account of every failure in the perfect and infallible execution of those laws. There is no authority for such a doctrine, and we are satisfied that it does not exist" (see *Howe v. New Orleans*, 12 La. Ann. 481). A municipal corporation is not liable for injuries inflicted upon a person passing in the public streets or parks by individuals there being, whether through their negligence, their recklessness, or their violation of the laws. Thus, where the plaintiff was injured by the careless firing of a cannon at a public meeting in a public park, it was held that the city was not liable, although its officers called the meeting together (*Boylard v. Mayor &c. of New York*, 1 Sandf. 27). The same doctrine is held in Massachusetts (*Morrison v. Lawrence*, 98 Mass. 219). The act incorporating the city of Cleveland provided, 'It shall be the duty of the city council to regulate the police of the city, preserve the peace, prevent disturbance, and disorderly assemblages.' Held, that the duty intended was properly appertaining to an administrative and legislative body, acting in the government of a city—the making regulations, by-laws, &c., and that, neither on general principles, nor from the effect of that enactment, was the city responsible for the destruction of property by a riotous assemblage of persons, or for the neglect of the officers in not preventing such destruction (*Western College v. Cleveland*, 12 Ohio St. 375). Gholson, J., said: "It is not the policy of governments to indemnify individuals for losses sustained, either from the want of proper laws, or from the inadequate enforcement of laws made to secure the property of individuals. Exceptions to this policy have been made; and, in some of our sister states, the loss by the violence of a mob has, by express legislation, been charged on the city in which it occurred. But we have no such legislation" (Ib.)

Thus, although a city has power, by its charter, to restrain the running at large of cattle or swine, it is not liable in damages for its council's neglect to pass any ordinance upon the subject, notwithstanding the plaintiff alleges special damages.<sup>1</sup> Its power in this respect is discretionary. Nor is a municipal corporation liable for an injury resulting from a breach of its ordinances or police regulations, as where the injury complained of is caused by swine running at large in the streets,<sup>2</sup> or where parties erecting buildings suffer piles of rubbish to encumber the street, which leads to the plaintiff's injury.<sup>3</sup> To make the corporation liable in such a case, notice of the obstruction must be brought home to it. The primary duty of its removal is with him who placed it there.

§ 154. A municipal corporation, which has been made liable for the consequences of an obstruction or excavation made in a highway by another, has a remedy over against the author of the nuisance, where no fault is imputable to the corporation in the matter.<sup>4</sup> Thus a municipal corpora-

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<sup>1</sup> *Kelley v. Milwaukee*, 18 Wisc. 83. It is certain that a town or city is no general warrantor against the acts of individuals, and ought not to be held responsible for the acts of third persons, which, under a more sagacious and efficient police, might possibly have been prevented (*Howe v. New Orleans*, 12 La. Ann. 481).

<sup>2</sup> *Levy v. Mayor &c. of New York*, 1 Sandf. 465.

<sup>3</sup> *Griffin v. Mayor &c. of New York*, 9 N. Y. 456; *Wallace v. Mayor &c. of New York*, 2 Hilt. 440.

<sup>4</sup> *Newbury v. Conn. & Pass. Rivers R. Co.*, 25 Verm. 377; 26 Id. 571; *Lowell v. Boston & L. R. Co.*, 23 Pick. 24; *Lowell v. Short*, 4 Cush. 275; *Lowell v. Spaulding*, 4 Id. 277; *Milford v. Holbrook*, 9 Allen, 17. But if a municipal corporation pay the amount of an award against them for damages resulting from an act for which they were not liable in law, they can have no recourse over against the actual wrong-doers, although notice was given to the latter to appear and make defense in the original action (see *Westchester v. Apple*, 35 Penn. St. 284). The plaintiffs agreed with a town to build piers for a bridge, to be completed before a certain time. They failed to complete the work within the time agreed, by reason of which individual inhabitants of the town, who had occasion to use the bridge, were subjected to considerable private expense and inconvenience. Held, that in a suit brought against the town for the price of the work, it could not recoup the damages sustained by these individuals (*Kinne v. New Haven*, 32 Conn. 210). A verdict and judgment against a

tion which has been compelled to pay damages to one injured by falling into an unguarded area made by the defendant has a remedy against the latter for repayment. It makes no difference that the work was done under the implied (though not express) license of the corporation; for a license to make the excavation is not a license to leave it open and unguarded, and no such license will be presumed. The rule, therefore, that one of two joint wrong-doers cannot have contribution from the other does not apply.<sup>1</sup> If, however, both the defendant and the corporation appear to have been in fault, the latter cannot of course recover.

§ 155. While a total want of funds, or the means of obtaining funds, with which to make repairs of a public work, is a good defense in favor of *quasi* corporations and public officers with restricted powers,<sup>2</sup> such a defense is not available in an action against an incorporated body for a

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city, in an action for injuries occasioned by a defect within the limits of a highway, is not conclusive evidence in a subsequent action by the city against a tenant of the land (see *Boston v. Worthington*, 10 Gray, 496).

<sup>1</sup> *Chicago v. Robbins*, 2 Black, 418; overruling *Scammon v. Chicago*, 25 Ill. 424; and see the case of *Roberts v. Chicago*, 26 Ill. 249. The court (Davis, J.) in that case (2 Black, 418), says: "No license can be presumed from the city to leave the area open and unguarded even a single night. The privilege extended to the defendant was for his benefit alone, and the city derived no advantage from it, except incidentally. The defendant impliedly agreed with the city that if he was permitted to dig the area for his own benefit, that he would do it in such a manner as to save the public from danger, and the city from harm. And he cannot now say that 'true it is, you gave me permission to make the area, but you neglected your duty in not directing me how to make it, and in not protecting it when in a dangerous condition.' If this should be the law, there would be an end to all liability over to municipal corporations, and their rights would have to be determined by a different rule of decisions from the rights of private persons." Where the expense of keeping a bridge in repair is imposed by statute upon several towns and a railroad company jointly, with a provision that the municipal authorities of one of the towns shall have the care and superintendence of it, and shall employ all services necessary in the care thereof, no action lies against such town in favor of the railroad company, to recover for damages sustained by the latter in consequence of a defect in the bridge (*Malden & Melrose R. Co. v. Charlestown*, 8 Allen, 245).

<sup>2</sup> *Garlinghouse v. Jacobs*, 29 N. Y. 297, and cases there cited. But compare *Adsit v. Brady*, 4 Hill, 630. See *post*, § 173.



breach of corporate duty, any more than the poverty of an individual would avail him in an action for his personal negligence.<sup>1</sup>

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<sup>1</sup> *Erie City v. Schwingle*, 22 Penn. St. 384; *Wendell v. Troy*, 39 Barb. 329, 338; affirmed, 4 Keyes, 261.

## CHAPTER IX.

### PUBLIC OFFICERS.

- SEC. 156. Judicial and ministerial functions distinguished.  
157. Judges of courts of record not liable for judicial acts.  
158. Judges liable for acting knowingly without jurisdiction.  
159. Liability of judges of courts not of record.  
160. Liability for acts done in malice and bad faith.  
161. Liability of magistrates for ministerial acts.  
162. Justice not liable for execution of process contrary to its tenor.  
163. Quasi judicial officers not liable for judicial acts.  
164. Election inspectors, how far liable.  
165. Officers exercising both judicial and ministerial functions.  
166. Non-judicial public officers classified.  
167. Liability of public officers to private action.  
168. The general rule of liability stated.  
169. Presumption in favor of public officer.  
170. De facto officers liable.  
171. Acts without or in excess of authority.  
172. Limitations of liability in cases of mere omissions of duty.  
173. The officer must possess means to perform.  
174. Who may complain of an omission of duty.  
175. Neglect of subordinate no excuse for an omission to act.  
176. Officers not liable for negligence of subordinate officers.  
177. Personal liability of public trustees, road commissioners, &c.  
178. The present rule in England.  
179. The rule in this country.  
180. Postmasters not liable for acts of their subordinates.  
181. Army and navy officers not liable for acts of subordinate officers.  
182. The rule otherwise as to public contractors.  
183. Officer not liable for acts of a third person exercising his functions.  
184. Sheriffs, county clerks, notaries, &c.

§ 156. The liability of a public officer to an individual for his negligent acts or omissions in the discharge of an official duty depends altogether upon the nature of the duty as to which the neglect is alleged. Where his duty is absolute, certain, and imperative, involving merely the execution of a set task—in other words, is simply *ministerial*—he is liable in damages to any one specially injured, either by his omitting to perform the task, or by performing it negligently or unskillfully. On the other hand,

where his powers are discretionary, to be exerted or withheld according to his own judgment as to what is necessary and proper, he is not liable to any private person for a neglect to exercise those powers, nor for the consequences of a lawful exercise of them, where no corruption or malice can be imputed, and he keeps within the scope of his authority.<sup>1</sup> An officer possessing such discretionary powers is spoken of as a judicial or *quasi* judicial officer, from the likeness of his discretionary functions to those of a judge who decides controversies between individuals.

§ 157. Judges of courts of record are never accountable in damages for their judicial acts<sup>2</sup> within their juris-

<sup>1</sup> *Kendall v. Stokes*, 3 How. [U. S.] 87; *Tompkins v. Sands*, 8 Wend. 462; *Gidley v. Palmerston*, 3 B. & B. 275. It has been laid down as a general principle that if a public officer simply errs in the discharge of his duty, he is not liable (*Donahoe v. Richards*, 38 Maine, 376; *Reed v. Conway*, 20 Mo. 22; *Allen v. Blunt*, 3 Story, 742).

<sup>2</sup> *Yates v. Lansing*, 5 Johns. 282; affirmed, 9 Id. 395; *Pratt v. Gardner*, 2 Cush. 68. In this case, Shaw, C. J., said: "It is a principle lying at the foundation of all well-ordered jurisprudence, that every judge, whether of a higher or a lower court, exercising the jurisdiction vested in him by law, and deciding upon the rights of others, should act upon his own free, unbiassed convictions, uninfluenced by any apprehension of consequences. It is with a view to his qualifications for this duty, as well in regard to his firmness as to his intelligence and impartiality, that he ought to be selected by the appointing power. He is not bound, at the peril of an action for damages, or of a personal controversy, to decide right in a matter either of law or fact, but to decide according to his own convictions of right, of which his recorded judgment is the test, and must be taken to be conclusive evidence. Such of necessity is the nature of the trust assumed by all on whom judicial power in greater or lesser measure is conferred. This trust is fulfilled when he honestly decides according to the conclusions of his own mind in a given case, although there may be great conflict of evidence, great doubts of the law, and when another mind might honestly come to another conclusion. But, in a controverted case, however slight may be the preponderance in one scale, it must lead to a decision as conclusive as if the weight were all in that scale. Now, it is manifest that to every controversy there are two sides, and that a decision in favor of one, must be against another. And this may extend to every interest which men hold most dear,—to property, reputation, and liberty, civil and social, to political and religious privileges, to all that makes life desirable, and to life itself. If an action might be brought against the judge by a party feeling himself aggrieved, the judge would be compelled to put in issue facts in which he has no interest, and the case must be tried before some other judge, who in his turn might be held amenable by the losing party, and so on indefinitely. If it

diction,<sup>1</sup> even if they act corruptly or oppressively, being in such case impeachable only. This principle, as was said by a very eminent judge,<sup>2</sup> “has a deep root in the common law.” It is to be found in the earliest judicial records, and it has been steadily maintained by an undisturbed current of decisions ever since.

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be said that it may be conceded that the action will not lie, unless in a case where a judge has acted partially or corruptly, the answer is, that the losing party may always aver that the judge has acted partially or corruptly, and may offer testimony of bystanders or others to prove it, and these proofs are addressed to the court and jury, before whom the judge is called to defend himself, and the result is made to depend not upon his own original conviction, the conclusion of his own mind in the decision of the original case, as by the theory of jurisprudence it ought to do, but upon the conclusions of other minds, under the influence of other and different considerations. The general principle which exempts judges from answering in a private action, as for a tort, for any judgment given in the due course of the administration of justice, seems to be too well settled to require discussion.” The same principle is laid down in the following and many other cases hereafter referred to (*Brodie v. Rutledge*, 2 Bay, 69; *Ambler v. Church*, 1 Root, 211; *Moor v. Ames*, 3 Caines, 170; *Young v. Herbert*, 2 Nott & M. 168; *Vanderheyden v. Young*, 11 Johns. 150; *Ely v. Thompson*, 3 A. K. Marsh, 76; *Little v. Moore*, 1 South. 74; *Tracy v. Williams*, 2 Conn. 113; *Tompkins v. Sands*, 8 Wend. 468; *Evans v. Foster*, 1 N. H. 374; *Lining v. Benthams*, 2 Bay, 1; *Briggs v. Wardwell*, 10 Mass. 356; *Lincoln v. Hapgood*, 11 Mass. 350; *Dillingham v. Snow*, 5 Mass. 547; *Colman v. Anderson*, 10 Mass. 105). No action can be sustained against a judge of probate for negligently appointing a bankrupt as guardian for an infant, and neglecting to take security from such guardian, by which the infant lost his estate (*Phelps v. Sill*, 1 Day, 315; *Smith v. Trawl*, 1 Root, 165).

<sup>1</sup> *Houlden v. Smith*, 14 Q. B. 841, 852. In that case, Patteson, J., said: “Although it is clear that the judge of a court of record is not answerable at common law in an action for an erroneous judgment, or for the act of any officer of the court wrongfully done, not in pursuance of, though under color of a judgment of the court, yet we have found no authority for saying that he is not answerable in an action for an act done by his command and authority when he has no jurisdiction.” And see *Yates v. Lansing*, 5 Johns. 282; 9 Id. 395; *Moor v. Ames*, 3 Caines, 170; *Brodie v. Rutledge*, 2 Bay, 69; *Cunningham v. Bucklin*, 8 Cow. 178; *State v. Campbell*, 2 Tyler, 182; *Weaver v. Devendorf*, 3 Denio, 117, per Beardsley, J., and cases cited. If a judicial officer, whether possessed of a general or special jurisdiction, act erroneously, or even oppressively, in the exercise of his authority, the individual at whose suit he acts is not answerable as a trespasser for the error or misconduct of the officer (*Taylor v. Moffatt*, 2 Blackf. 305).

<sup>2</sup> Per Kent, C. J., in *Yates v. Lansing*, 9 Johns. 395, by whom the authorities are fully stated and commented upon. In this case, the Chancellor of New York having committed a person for malpractice and contempt, and having after such person's discharge on *habeas corpus* issued by a judge of the Supreme Court, recommitted him, it was held that the chancellor was not liable to the penalty provided in the *habeas corpus*

§ 158. It will be seen that the only limitation of the judicial privilege is that the acts of the judge should have been done within his jurisdiction. But to this is to be added that to make a judge of a court of record liable for a want of jurisdiction, the defect must be one of which he knew, or ought to have known. If the facts upon which the jurisdictional question was determined were entirely plain, admitting of no doubt of a want of jurisdiction, he is liable. It is an error of law, and not of fact.<sup>1</sup> Where the alleged facts of the case, as they appear in evidence, give jurisdiction, he is protected,<sup>2</sup> although afterward they turn out to be false.

§ 159. The judicial privilege is enjoyed by the judges of inferior, as well as by those of superior courts.<sup>3</sup> But the jurisdiction of inferior courts is necessarily special and limited: there is no presumption of jurisdiction in

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act: "No person set at large on *habeas corpus* shall be again imprisoned for the same offense, unless by the legal or due process of the court having jurisdiction of the cause." See *Garnett v. Ferrand*, 6 Barn. & Cr. 611; *Ryalls v. Regina*, 11 Q. B. 795; *Hamond v. Howell*, 1 Mod. 184; 2 Mod. 218; *Miller v. Seare*, 2 Wm. Blackst. 1141; *Aire v. Sedgwick*, 2 Rolle Rep. 195; *Mostyn v. Fabrigas*, 1 Cowp. 172; *Holyrod v. Breare*, 2 Barn. & Ald. 473. The question in the last case would seem to have been whether the person doing the wrongful act was so servant of the judge issuing process as to make the latter answerable for the act; and it was held that an officer is not such a servant to the judge of the court.

<sup>1</sup> *Houlden v. Smith*, 14 Q. B. 841. "It is clear, therefore, that a judge is not liable in trespass for want of jurisdiction, unless he knew, or ought to have known, of the defect; and it lies on the plaintiff in every such case to prove that fact" (per Parke, B., *Calder v. Hacket*, 3 Moore P. C. 76). In *Watson v. Bodell* (14 Mees. & W. 57) it was assumed that the want of jurisdiction was known to the defendant. In *Beaurain v. Scott* (3 Campb. 388) and *Smith v. Bouchier* (2 Str. 993) the objections to the jurisdiction were apparent on the face of the proceedings (see 2 Stark. Ev. 809).

<sup>2</sup> *Lowther v. Radnor*, 8 East, 113, 119; *Gwinne v. Poole*, 2 Lutw. App. 1560, 1566.

<sup>3</sup> *People v. Stocking*, 50 Barb. 573; *Weaver v. Devendorf*, 3 Denio, 117; *Bailey v. Wiggins*, 5 Harringt. 462. In *Miller v. Seare*, 2 Wm. Blackst. 1145, De Grey, C. J., said: "The protection in regard to the superior courts is absolute and universal; with respect to the inferior, it is only while they act within their jurisdiction" (and see *Garnett v. Ferrand*, 6 Barn. & Cr. 611; and cases cited under § 158).

their favor.<sup>1</sup> Every such tribunal decides at its peril; and process issuing therefrom is not necessarily any protection to the court, attorney or party, or to the officer who, however innocently, executes it.<sup>2</sup> It is laid down, however,

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<sup>1</sup> *Wiley v. Strickland*, 8 Ind. 453; *Williams v. Bower*, 26 Mo. 601; *State v. Hartwell*, 35 Maine, 129; *Lane v. Crosby*, 42 Id. 327; *Call v. Mitchell*, 39 Id. 465. Jurisdiction cannot be inferred (*Hersom's Case*, 39 Maine, 476; *Matlock v. Strange*, 8 Ind. 57. But see *Mooney v. Williams*, 15 Mo. 442; *Wright v. Hazen*, 24 Verm. 143).

<sup>2</sup> *Cable v. Cooper*, 15 Johns. 157, per Van Ness, J.; *Blood v. Sayre*, 17 Verm. 609; *Doswell v. Impey*, 1 Barn. & Cr. 169. In the last case, Abbott, C. J., said: "The general rule of law as to actions of trespass against persons having a limited authority is plain and clear. If they do any act beyond the limit of their authority, they thereby subject themselves to an action of trespass; but if the act done be within the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such an action." A ministerial officer is protected in the execution of process wherever there is jurisdiction of the subject-matter, if the process is regular on its face, and does not disclose the want of jurisdiction (*Savacool v. Boughton*, 5 Wend. 170; *Parker v. Walrod*, 16 Wend. 514; *Earl v. Camp*, 16 Wend. 562; *Pierson v. Gale*, 8 Verm. 512; *Beach v. Furman*, 9 Johns. 229; *Lattin v. Smith*, Breese, 284; *Nichols v. Thomas*, 4 Mass. 232; *Portland Bank v. Stubbs*, 6 Mass. 422). But where an inferior court exceeds its jurisdiction, its warrant will afford no protection to the officer serving it, if on its face it appears to be illegal, or is known to be so by the officer (*Campbell v. Webb*, 11 Md. 471; *Kelly v. Bemis*, 4 Gray, 83; *Reynolds v. Orvis*, 7 Cow. 269; *Evertson v. Sutton*, 5 Wend. 281; *Lewis v. Palmer*, 6 Id. 367; *Merritt v. Read*, 5 Denio, 352; *Tate v. Chambers*, 3 Nott & M. 523; *Edwards v. Ferris*, 7 Carr. & P. 542). The officer may stop in the execution of process whenever he becomes satisfied that there is a want of jurisdiction; and in a suit for neglect of duty, he may show such want of jurisdiction in defense. This rule of law is personal, however, and one of protection merely (*Savacool v. Boughton*, 5 Wend. 170; *Parker v. Walrod*, 16 Wend. 514; *Earl v. Camp*, 16 Wend. 562; *Pierson v. Gale*, 8 Verm. 512; *Beach v. Furman*, 9 Johns. 229; *Lattin v. Smith*, Breese, 284; *Nichols v. Thomas*, 4 Mass. 232; *Portland Bank v. Stubbs*, 6 Mass. 422). Where a justice of the peace issued a warrant of arrest on a criminal charge, with an indorsement thereon directing that the accused should be committed until a subsequent day, and the constable on the same evening arrested and committed the accused without first bringing him before the justice, it was held that the justice exceeded his authority, and that both he and the constable were liable in trespass (*Pratt v. Hill*, 16 Barb. 303; *Revill v. Pettit*, 3 Metc. [Ky.] 314. A justice is liable to one arrested under a warrant issued under a statute adjudged unconstitutional (*Kelly v. Bemis*, 4 Gray, 83). If a magistrate proceed unlawfully in issuing process, he, and not the executive officer, is liable. But the law does not invoke the aid of courts to punish the officers of justice for trifling errors in drawing up legal process (*Taylor v. Alexander*, 6 Ohio, 144; *Wallsworth v. McCullough*, 10 Johns. 93). For applications of the rule stated in the text the reader is referred to the following cases: *Cohoon v. Speed*, 2 Jones [N. C.] Law, 133; *Piper v. Pearson*, 2 Gray, 120; *Clarke v. May*, 2 Gray, 410; *Adkins v. Brewer*, 3 Cow. 206; *Schroepel v. Taylor*, 10 Wend. 196; *Vosburgh v. Welsh*, 11 Johns. 175; *Davis v. Marshall*, 14 Barb. 96;

that a magistrate is not liable for anything done in the discharge of his duty, unless he is made acquainted with all the circumstances necessary to enable him to determine when called upon to act.<sup>1</sup>

§ 160. An additional qualification is attached to the rule of judicial privilege as applied to inferior magistrates, which does not apply to judges of courts of record, and that is, that the act complained of, though judicial and within the jurisdiction of the officer, must have been done *honestly and in good faith*.<sup>2</sup> Thus, a justice of the peace, who unjustly and maliciously refuses to grant an appeal,<sup>3</sup> or maliciously grants a warrant for a felony, without any information,<sup>4</sup> or maliciously convicts a prisoner,<sup>5</sup> is liable

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West v. Smallwood, 3 Mees. & W. 418; Caudle v. Seymour, 1 Q. B. 889; King v. Birnie, 5 Carr. & P. 206; Davis v. Capper, 10 Barn. & Cr. 28; Wedge v. Berkeley 6 Id. 663; Rex v. Constable, 1 Q. B. 894, note; Crepps v. Durden, Cowp. 640; Case v. Mountain, 1 Man. & G. 257; Doggett v. Cook, 11 Cush. 262; Rogers v. Mulliner, 6 Wend. 600; Hoöse v. Sherrill, 16 Id. 33; Craig v. Burnett, 32 Ala. [N. S.] 728.

<sup>1</sup> Pike v. Carter, 3 Bing. 78.

<sup>2</sup> The rule as stated in the cases is almost always qualified by these words. Thus, it is stated that a justice is not liable for a judicial act within his discretion, unless he has acted from *malicious, impure, and corrupt motives* (Gregory v. Brown, 4 Bibb, 28; Morgan v. Dudley, 18 B. Monr. 693; Bullitt v. Clement, 16 Id. 193; Bevard v. Hoffman, 18 Md. 479; State v. Campbell, 2 Tyl. 177; Hetfield v. Towsley, 3 Iowa, 584; Howe v. Mason, 14 Iowa, 510). A judicial officer, acting *honestly*, is not liable for a mistake of the law, provided he has jurisdiction (Briggs v. Wardwell, 10 Mass. 356; Lincoln v. Hapgood, 11 Mass. 350; Dillingham v. Snow, 5 Mass. 547; Colman v. Anderson, 10 Mass. 105). If a justice acts corruptly, he can be made to answer, criminally and civilly (Garfield v. Douglass, 22 Ill. 100). A justice, if he acted *honestly* and within his jurisdiction, will not be liable for issuing a *mittimus* upon which the plaintiff was imprisoned (Downing v. Herrick, 47 Maine, 462); nor for refusing to take bail on a criminal charge, without proof of *malice* (Linford v. Fitzroy, 13 Q. B. 240).

<sup>3</sup> Hardison v. Jordan, Cam. & Nor. 454; Tompkins v. Sands, 8 Wend. 462. A justice of the peace is not liable to an action for not sending up the recognizance of an appellant from his decision in a civil case, if the same is not demanded of him, and his fees tendered therefor (Jones v. Werden, 12 Cush. 133).

<sup>4</sup> Morgan v. Hughes, 2 T. R. 225; see Pratt v. Gardiner, 2 Cush. 63; Wasson v. Canfield, 6 Blackf. 406.

<sup>5</sup> Burley v. Bethune, 1 Marsh. 220. But it is not enough for the plaintiff in an action against a justice for a malicious conviction to show that he was innocent. He must show want of probable cause (Ib. See Davis v. Capper, 10 Barn. & Cr. 28).

to an action. So an action lies against a justice, who, after taking time to consider a case, renders judgment against a party, and deceitfully conceals the fact from him until it is too late to appeal.<sup>1</sup> But, without proof of fraud or evil intent, an action will not lie against a justice for negligence or carelessness in giving, to a party about to prosecute an appeal, erroneous information as to the amount of a judgment rendered by him, by means whereof the appeal was lost. The giving of such information is not an official act, and he is not responsible for an unintentional mistake therein.<sup>2</sup> .. .

§ 161. Of course a magistrate, in the exercise of functions which are purely ministerial, is not protected by the judicial privilege. He is liable for his negligence, like every other ministerial officer. Thus issuing process in the first instance,<sup>3</sup> issuing execution after judgment,<sup>4</sup> accepting of an appeal bond,<sup>5</sup> and the making of a return

<sup>1</sup> *Neighbour v. Trimmer*, 1 Harr. [N. J.] 58.

<sup>2</sup> *Wickware v. Bryan*, 11 Wend. 545. So a justice is not liable in an action for a false return on an appeal, without proof of a fraudulent intent (*Millard v. Jenkins*, 9 Wend. 298).

<sup>3</sup> *Smith v. Trawl*, 1 Root, 165, where the justice issued a writ of replevin without requiring security. And see *Rogers v. Mulliner*, 6 Wend. 597.

<sup>4</sup> *Percival v. Jones*, 2 Johns. Cas. 49; *Taylor v. Trask*, 7 Cow. 249; *Briggs v. Wardwell*, 10 Mass. 356; *Sullivan v. Jones*, 2 Gray, 570; *Voorhies v. Martin*, 12 Barb. 508; *Tyler v. Alford*, 38 Maine, 530; *Noxon v. Hill*, 2 Allen, 215. But where a justice mistakenly issued an execution returnable in sixty days instead of ninety days, as required by law, whereby the plaintiff lost his debt, it was held that he was not liable (*Wertheimer v. Howard*, 30 Mo. 420). In general, a mere irregularity in the form of a commitment will not form the subject of an action (*Dicas v. Brougham*, 1 M. & Rob. 309).

<sup>5</sup> *Tompkins v. Sands*, 8 Wend. 462; see *Linford v. Fitzroy*, 13 Q. B. 240. Approving of an appeal bond was held a judicial act in *Howe v. Mason* (14 Iowa, 510); and it has been held, in Massachusetts, that no action will lie for an error in judgment in approving an appeal bond in a form not authorized by law, and therefore invalid (*Chickering v. Robinson*, 3 Cush. 543; *Way v. Townsend*, 4 Allen, 114). A justice who neglects to make the entry on his docket, of the inventory required by law where he has taken an acknowledgment of a personal mortgage, is, it seems, liable for the damage occasioned by such neglect (*Harlon v. Birger*, 30 Ill. 425).



on appeal,<sup>1</sup> are ministerial acts. Refusing a license to keep an inn or ale-house,<sup>2</sup> is, however, a judicial act. So is the continuance or postponement of a cause.<sup>3</sup>

§ 162. Even where a justice issues process without jurisdiction, he is only liable for injuries committed in executing it according to its tenor. Thus, where a justice issued an execution directed to "any constable," which was delivered to, and executed by, a deputy sheriff, it was held that the justice was not liable.<sup>4</sup> So a justice is not liable for execution of the process after the return day, even though he has received the money from the officer, it not appearing that the justice had notice when he received the money that it was collected after the return day.<sup>5</sup>

§ 163. Persons exercising judicial functions, by whatever name they may be called, enjoy the protection of the judicial privilege. Indeed, any officer, sworn to act faithfully, according to the best of his ability, and according as

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<sup>1</sup> *Houghton v. Swartwout*, 1 Denio, 589. But, to maintain an action against a justice for a false return, the plaintiff must show a fraudulent intent, and that he would have prevailed upon the appeal had it not been for the falsity of the return (*Millard v. Jenkins*, 9 Wend. 298; but see *Kidzie v. Sackreder*, 14 Johns. 195). When an inferior court has jurisdiction of the subject-matter, but is bound to adopt certain forms in its proceedings, and deviates from them to the injury of a party, he has a remedy by action against all those who participated in the injury (*Mayberry v. Kelly*, 1 Kansas, 116; *Newman v. Hardwicke*, 8 Ad. & El. 125; see *Alexander v. Card*, 3 R. I. 145).

<sup>2</sup> *Bassett v. Godschall*, 3 Wils. 121.

<sup>3</sup> *Pratt v. Gardner*, 2 Cush. 63; see *Wheeler v. Nesbit*, 24 How. [U. S.] 544. All the proceedings which a justice is required to perform, from the commencement to the close of a suit, are, it seems, to be held to be of a judicial, rather than of a ministerial character, so far as to exempt him from any greater responsibility for his acts than that which attaches to other judicial officers (*Wertheimer v. Howard*, 80 Mo. 420).

<sup>4</sup> *Merritt v. Read*, 5 Denio, 352.

<sup>5</sup> *Van Rensselaer v. Kidd*, 6 N. Y. 331. Where a constable, contrary to the direction in the writ, attached exempted arms and accoutrements, the justice issuing the writ was held not liable (*Collins v. Ferris*, 14 Johns. 246).

things shall appear to him, is a judicial officer within the rule.<sup>1</sup> Thus jurors, in determining their verdict, act judicially, and are not responsible to any one for their verdict. And it was very early decided that no grand juror was responsible for finding an indictment.<sup>2</sup> Commissioners in bankruptcy, whose records are declared by statute to be conclusive evidence of all facts therein contained, enjoy the judicial privilege, and no action will lie against them for official misconduct, however corrupt or malicious.<sup>3</sup> So courts martial sit as judges, and the members are not answerable to a party aggrieved by their sentence. But their jurisdiction is limited, and, in a case clearly without the jurisdiction of the court, its sentence will be no protection, and the court and the officer are alike trespassers.<sup>4</sup> A board of supervisors, in examining, settling, and allowing accounts chargeable to the county, act judicially, and they are not liable in any civil action for their determination, however erroneous or

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<sup>1</sup> *Seaman v. Patten*, 2 Caines, 312. In that case, Livingston, J., said: "An officer, acting under a commission from government, who is enjoined by law to the performance of certain things, *if in his judgment or opinion* the requisites therein mentioned have been complied with, and who is inhibited, under the like exercise of his own discretion, from doing other things, who is sworn to discharge these duties to the best of his ability, and exposed also to penalties, as well for negligence as for acting where he ought not, is not answerable to a party who may consider himself aggrieved, for an omission arising from a mistake or a mere want of skill, if there is no bad faith, corruption, malice, or some misbehavior or abuse of power." In *Vanderheyden v. Young* (11 Johns. 150, 158), Spencer, J., said: "Whenever the law vests any person with a power to do an act, and constitutes him a judge of the evidence on which the act may be done, and at the same time contemplates that the act is to be carried into effect through the instrumentality of agents, the person thus clothed with power is invested with discretion, and is, *quoad hoc*, a judge." See also *Martin v. Mott*, 12 Wheat. 19; *Allen v. Blunt*, 3 Story C. C. 742; *Gould v. Hammond*, 1 McAll. C. C. 235; *Ela v. Smith*, 5 Gray, 136.

<sup>2</sup> *Floyd v. Barker*, 12 Co. 23.

<sup>3</sup> *Cunningham v. Bucklin*, 8 Cow. 178. Thus, a commissioner is not liable for committing a bankrupt not answering to his satisfaction (*Doswell v. Impey*, 1 Barn. & Cr. 163).

<sup>4</sup> *Vanderheyden v. Young*, 11 Johns. 150; *Wise v. Withers*, 3 Cranch, 311; reversing *S. C.*, 1 Cranch C. C. 262.

wrongful. If they wickedly abuse, or fraudulently exceed, those powers, they are punishable by indictment.<sup>1</sup>

§ 164. Officers who preside at elections, unless they are made the sole and final judges of the qualifications of persons offering to vote, do not exercise a strictly judicial function in determining the qualifications of a voter.<sup>2</sup> The question as to whether a voter was or was not entitled to vote is open to examination in subsequent proceedings upon any competent evidence ;<sup>3</sup> yet their functions are so

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<sup>1</sup> *People v. Stocking*, 50 Barb. 573; *People v. Schenectady*, 35 Barb. 408; compare *Wasson v. Mitchell*, 18 Iowa, 153. And where such a body neglect or refuse to discharge a duty fairly imposed by law, performance may be compelled by *mandamus* (*Brady v. Supervisors of New York*, 2 Sandf. 460; 10 N. Y. 260; *People v. Supervisors of Ulster*, 3 Barb. 332; *People v. Edmonds*, 15 Barb. 529; *People v. Supervisors of Livingston*, 43 Barb. 298; *People v. Supervisors of New York*, 32 N. Y. 473; *Martin v. Supervisors of Greene*, 29 N. Y. 645; see *Bell v. Esopus*, 49 Barb. 506). A board of pilot commissioners is a *quasi* judicial body, intrusted with duties, the performance of which requires the exercise of judgment and discretion, and its members are not civilly answerable for their acts as such (*Dower v. Lent*, 6 Cal. 94). Assessors, in deciding the question of residence with reference to taxation, act judicially, and so acting within the extent of their authority, are not liable to an action, though they err in judgment (*Brown v. Smith*, 24 Barb. 419; *Perry v. Buss*, 15 N. H. 222). In Vermont, it is held that while, in relation to most of the duties of listers, their judgment, exercised in good faith, is conclusive in their favor, yet in relation to setting real estate in the list to the owners or the persons liable to pay taxes thereon, so far as relates to the persons to whom the land is to be set, and the number of acres, if they act in good faith and with common skill and prudence, they will not be liable for mistakes and inaccuracies; but if not, they will be liable to the party injured for the consequences of such mistakes (*Wilson v. Marsh*, 34 Verm. 352). The rule has been extended to the vicar-general of the bishop in excommunicating the plaintiff for contumacy in refusing to take upon him administration of an intestate's good, &c. (*Ackerley v. Parkinson*, 3 Maule & S. 411), to an inspector of provisions in condemning as unmerchantable the plaintiff's beef (*Seaman v. Patten*, 2 Caines, 312), and to a surveyor having authority by statute to dig down or raise a street, doing it with discretion, and not wantonly (*Callender v. Marsh*, Pick. 418).

<sup>2</sup> *Ashby v. White*, 2 Ld. Raym. 938; *Harman v. Tappenden*, 1 East, 555; *Drew v. Coulton*, 1 East, 563, *note*. In South Carolina, in cases of contested elections, the managers of the election have authority to hear and determine the contest, and in such case their decision is final (*State v. Dellesseline*, 1 McCord, 52).

<sup>3</sup> *People v. Pease*, 27 N. Y. 45; affirming 30 Barb. 588; *People v. Bristol & B. Turnpike Co.*, 23 Wend. 228; *ex parte Murphy*, 7 Cow. 153; *ex parte Heath*, 3 Hill, 42; *People v. Seaman*, 5 Denio, 409; *Regina v. Ledyard*, 8 Ad. & El. 535; *Regina v. Quayle*, 11 Id. 508; *Sudbury v. Stearns*, 21 Pick. 148.

far judicial as to protect them from liability for an error of judgment; and they are not liable to an action for refusing an elector's vote, unless they act corruptly or maliciously.<sup>1</sup> In making a return, election inspectors clearly act ministerially, and an action on the case will lie for a false return.<sup>2</sup>

§ 165. Officers whose chief functions are judicial or discretionary may become bound to the performance of duties purely ministerial in their nature. Thus, an officer may be said to act judicially so far as he exercises his judgment in reference to the manner, time, and place in which he will do a certain thing; yet having determined upon these, or having actually entered upon the execution of the work, he then begins to act ministerially.<sup>3</sup> In the

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Jenkins v. Waldron, 11 Johns. 114; Wheeler v. Patterson, 1 N. H. 88; Weckerly v. Geyer, 11 Serg. & R. 35; Gordan v. Farrar, 2 Dougl. [Mich.] 411; Rail v. Potts, 8 Humph. 225; Bevard v. Hoffman, 18 Md. 479. No action lies against the selectmen of a town for refusing to put upon the list of voters therein the name, and rejecting the vote of one who was not a legal voter, although the proof produced by him to them was sufficient to establish *prima facie* his right to vote; and they may prove at the trial that in fact he was not a legal voter (Lombard v. Oliver, 3 Allen, 1; but compare Oakes v. Hill, 10 Pick. 333; Gardner v. Ward, 2 Mass. 244, *n.*; Lincoln v. Hapgood, 11 Mass. 350; Keith v. Howard, 24 Pick. 292; Gates v. Neal, 23 Pick. 308; and Spear v. Cummings, Id. 224, 227, per Shaw, C. J.; Anderson v. Milliken, 9 Ohio, 568). An action does not lie against a churchwarden presiding at the election of vestrymen and auditors, for refusing the vote of a party entitled to vote for vestrymen and auditors, or for refusing to allow as a candidate a party entitled to be a candidate, unless malice be alleged and proved (Tozer v. Child, 7 Ellis & B. 377). By malice, which will render an officer liable in such case, is meant the refusal of a vote from improper motives, and contrary to his own opinion (Weckerly v. Geyer, 11 Serg. & R. 35; Chrisman v. Bruce, 1 Duvall, 63; Drewe v. Coulton, 1 East, 563, *note*; see Oakes v. Hill, 10 Pick. 333).

<sup>2</sup> Regina v. Heathcote, 10 Mod. 48; see Prideaux v. Morrice, 7 Id. 14.

<sup>3</sup> Rochester White Lead Co. v. Rochester, 3 N. Y. 463. "Duties which are purely ministerial in their nature are sometimes cast upon officers whose chief functions are judicial. When this occurs, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct" (per Beardsley, J., Wilson v. Mayor &c. of New York, 1 Denio, 595). The laying out of a way by county commissioners is a judicial act, but the construction of it, and the building of a bridge which forms part thereof, is a ministerial duty, for negligence in the performance of which the city or individuals undertaking its performance will be held liable (Stone v. Augusta, 46 Maine, 127; Kavanagh v. Brooklyn, 38 Barb. 232).

exercise of his discretionary or judicial functions he is exempted from personal liability for errors and mistakes : in executing his purely ministerial functions, he is, like every executive officer, liable for the consequences of his negligence. Thus, where a public officer is charged with the duty of causing such repairs of a canal to be made as he should from time to time perceive to be necessary, he is not liable in a civil action for the consequences of honestly judging that no repairs are necessary in a particular instance. The law confides a discretion to him, which, if exercised in good faith, cannot be questioned.<sup>1</sup> But where there is an actual break in the canal, by which navigation is impeded, then the necessity of repairs is clear and palpable, and the duty of the officer to make them is imperative, and (subject to the exceptions hereafter noticed)<sup>2</sup> he is liable to one who is specially injured by his neglect to make such repairs.<sup>3</sup>

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<sup>1</sup> *Griffith v. Follett*, 20 Barb. 620. In that case it was alleged that the bank of the canal was weak and dangerous; that there was great danger that a break would occur; and that in consequence of the weakness of the bank and danger of a break, the navigation was dangerous; and that the defendant had notice of these facts. It was held, on demurrer, that the complaint did not state a cause of action. *Greene, J.* said: "The substance of this averment is that the defendant knew the condition of this bank; that it was in fact so weak that there was danger that it would break; and that the defendant neglected to repair it. All this may be true, and still the defendant may be guiltless of any neglect of duty in the matter. The sufficiency of this bank, and all the other parts of the canal under the defendant's charge, the necessity of repairs in all cases of this kind, and the extent of the repairs required by the necessities of each particular case, were all matters which the law had committed to his discretion; and the question as to his duty in such cases is one which, from its nature, must necessarily be determined by his judgment. For aught that appears, he had examined this bank, and upon such examination had concluded that no repairs were necessary. \* \* \* He may have judged unwisely, even carelessly, but for the purposes of a civil action his judgment is none the less conclusive. When the law confides a discretion to its officers, it will never allow their acts, done in good faith within the limits of that discretion, to be questioned." See also *Burton v. Fulton*, 47 Penn. St. 151.

<sup>2</sup> *Post*, § 172.

<sup>3</sup> *Adsit v. Brady*, 4 Hill, 630; per *Greene, J.*, *Griffith v. Follett*, 20 Barb. 620. For other illustrations of this principle, see *ante*, § 153, and *post*, § 172.

§ 166. In speaking of the liability of non-judicial public officers to a civil action by private persons, it will be found convenient, if not indeed necessary to a proper understanding of the decided cases, to make a distinction between those officers whose duties are of a general public nature, and who act for the profit of the public at large, and that other class of officers who are appointed to act, not for the public in general, but for such individuals as may have occasion to employ them for a specific fee paid. Of the latter class are such officers as sheriffs, constables, notaries public, and the like,<sup>1</sup> who do not receive compensation from the public treasury, but from individuals who compensate them for particular services rendered.

§ 167. There has never been any question that officers belonging to the latter class were liable in damages for any act of negligence or abuse of office to any individual specially injured thereby. As to officers belonging to the former class, their obligations being to the public at large, and they owing no specific duty to individuals, it has been sometimes held that the only remedy for their misconduct in office was by indictment or by action for the statutory penalty, if any, and not by a private action for damages.<sup>2</sup>

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<sup>1</sup> Attorneys and counsellors at law are public officers (Seymour v. Ellison, 2 Cow. 13, 29, and note).

<sup>2</sup> Dunlop v. Knapp, 14 Ohio St. 64; see Stewart v. Southard, 17 Ohio, 402. Judge Sandford, in a dissenting opinion, in Hutson v. Mayor &c. of New York (5 Sandf. 289), says: "It seems to us the true distinction is that we have mentioned: when the duty is to individuals specially, for a reward emanating from them, a civil action may be brought for neglect, whether of them or of their subordinates; but when it is a duty to the *public generally*, undertaken alike for all citizens, the remedy is by indictment only, together with removal from office when prescribed by law." This language was approved by Selden, J., in Weet v. Brockport (16 N. Y. 167, note). The same idea is hinted by Brady, J., in O'Meara v. Mayor &c. of New York (1 Daly, 425). In Young v. Commissioners of Roads (2 Nott & McCord, 537), which was an action brought against the commissioners of roads for an injury to the plaintiff's horse and wagon from the insufficiency of a bridge, which it was alleged they were bound to repair, the court, upon granting a new trial, the plaintiff having

In the one case, it was thought, the officer owed an obligation to the public alone, and in the other that he owed it only to the individual who employed him. But the liabilities of a public officer will not be determined by the mode in which he receives the rewards of his labor. He may be liable for official misconduct, though he receive no compensation at all.<sup>1</sup> A sheriff, who is paid for particular services by individuals, is not less a public officer than a postmaster, who receives a salary from the government. The contract of each, usually confirmed by an oath, is a contract made with the government, to faithfully discharge the duties of his office. An individual who deposits a letter for transmission with a postmaster has as much right to insist upon the latter performing his duty in respect to his letter as he has to insist that a sheriff to whom he directs a writ shall faithfully execute and return it. It is impossible to see that there is more of a contract with the individual in the one case than in the other. The duty of each is under the law: the sheriff is bound to act on certain prescribed terms, the postmaster absolutely and unconditionally. It is now settled in New York that, so far as concerns the question of *remedy*, there is no distinction between these two classes of public officers.<sup>2</sup> There are other reasons for maintaining the distinction, which will be adverted to hereafter.

§ 168. As to the liability of public officers, not judi-

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had judgment, said: "Where an officer has been appointed to act not for the public in general, but for individuals in particular, and from each individual receives an equivalent for the services rendered him, he may be responsible in a private action for neglect of duty; but where the officer acts for the public in general, the appropriate remedy for his neglect of duty is a public prosecution."

<sup>1</sup> See *Clothier v. Webster*, 12 C. B. [N. S.] 790; *ante*, § 120.

<sup>2</sup> *Robinson v. Chamberlain*, 34 N. Y. 389, per Peckham, J., in a very clear and discriminating opinion.

cial, to a private action for violation of an official duty, it may be stated as a general rule that a public officer who acts maliciously,<sup>1</sup> or without authority, or in excess of authority,<sup>2</sup> or carelessly and negligently, or who, contrary to his duty, omits to act,<sup>3</sup> or otherwise abuses his office, is answerable in damages to any one who is specially injured thereby.<sup>4</sup> It is not enough that he has acted *bona*

<sup>1</sup> An action on the case has been held to lie against a governor for *maliciously* suspending another from a civil office (*Sutherland v. Murray*, cited in *Johnston v. Sutton*, 1 T. R. 538). It has been held in Missouri that the surveyor-general was not liable for removing a deputy, although under a contract, with which his removal was an unwise and unlawful interference, provided he acted according to his best judgment, or from a desire to promote the public interests, and not from malice (*Reed v. Conway*, 26 Mo. 13; see *ante*, § 160). The commander of a government war vessel who seizes a vessel on the high seas, and sends her in for adjudication for breach of a particular law, is liable for damages, unless there was reasonable ground of suspicion that she was violating the laws (*Murray v. The Charming Betsey*, 2 Cranch, 63; *Little v. Barreme*, 2 Id. 170; *Maley v. Shattuck*, 3 Id. 458; *The Eleanor*, 2 Wheat. 345; and see *Burke v. Trevitt*, 1 Mason, 96; *Stoughton v. Dimick*, 3 Blatchf. 356; S. C., 29 Verm. 535).

<sup>2</sup> *Post*, § 171.

<sup>3</sup> *Adsit v. Brady*, 4 Hill, 630; *Shepherd v. Lincoln*, 17 Wead. 250; see *post*, § 174.

<sup>4</sup> *Bronson, J.*, in *Adsit v. Brady* (4 Hill, 630), lays down the broad rule that "when an individual sustains an injury by the misfeasance or non-feasance of a public officer who acts or omits to act contrary to his duty, the law gives redress to the injured party by an action adapted to the nature of the case." But this proposition is criticised by *Wright, J.* (*Garlinghouse v. Jacobs*, 29 N. Y. 297, 312), who says: "There is no reported English or American authority that justifies so broad a rule of liability of a public officer. There is no case where the duty of the officer was one due to the public at large, and not to any individual, either specially or for fee or reward paid by him, in which the officer has been made accountable in a private action for a mere neglect of duty. And the fact that no such action has been brought or sustained, either in England or in this state, for a century and a half, except the single case of *Adsit v. Brady*, affords a strong presumption that no such action will lie." But this language cannot be taken as adopted by the court, which placed its decision on a ground not in conflict with that on which *Adsit v. Brady* was decided. In speaking of the same rule, *Peckham, J.*, in the same court, in the later case of *Robinson v. Chamberlain* (34 N. Y. 389), said: "This is a healthful rule, sound entirely in public policy, if as a rule of law it can be questioned. As a rule of law, as there applied, it has stood for nearly a quarter of a century, and I think should continue. \* \* \* Exclusive of judicial action, every officer in the land, in my judgment, is responsible for a violation of his official duty to him who sustains special damage thereby." And this, we think, is the law as now settled in New York. In *Henley v. Mayor of Lyme Regis* (5 Bing. 91); affirmed 3 Barn. &



*fide* and to the best of his skill and judgment. He is bound to conduct himself with the skill and diligence which could reasonably be required of a skillful and diligent person under the circumstances.<sup>1</sup>

§ 169. It has been held that there is a strong presumption that a sworn public officer has performed the duties of his office faithfully;<sup>2</sup> and with respect to acts done in excess of authority, it is a general rule that, where a public

Ad. 77; 1 Bing. [N. C.] 222), Best, C. J., said: "Now, I take it to be perfectly clear that if a public officer abuses his office, either by an act of omission or commission, and the consequence is an injury to an individual, an action may be maintained against such public officer." On appeal (3 Barn. & Ad. 99), Lord Tenterden said: "We think the obligation to repair the banks and sea-shores is one which concerns the public, in consequence of which an indictment might have been maintained against the plaintiffs in error for their general default; from whence it follows that an action on the case will lie against them for a direct and particular damage sustained by an individual, as in the ordinary case of nuisance in a highway by a stranger digging a trench, &c., or by the act or default of a person bound to repair *ratione tenuræ*." An officer, intrusted by the common law or statute, is liable to an action for negligence in the performance of his trust or duty, or for fraud or neglect in the execution of his office (Jenner v. Joliffe, 9 Johns. 381). A tender of a drawbridge, appointed by the governor, with a salary, having full control and direction of the passing of all vessels through the draw, and of the opening of the draw and the care of the lamps upon the bridge, furnishing all necessary assistance therefor, whose duty it was to allow no unnecessary detention of vessels, having due regard and caution for the public travel, and who was required to give bonds to the treasurer of the commonwealth for the faithful performance of his duties, was held liable in damages to a person injured solely through his failure to have due regard and caution for the public travel in performing his duties (Nowell v. Wright, 3 Allen, 171).

<sup>1</sup> Jones v. Bird, 5 Barn. & Ald. 837; Bailey v. Mayor &c. of New York, 3 Hill, 531. In the first case it was held that commissioners of sewers, and persons working by their order, in the course of the repair of a sewer in the neighborhood of houses, are bound to take all such proper precautions for securing the houses from falling, and to shore them up, if necessary, as skillful persons would do; and they were bound to give specific notice to the owner of the house of the danger from the construction of the sewer. General notice to him to take proper means to secure his house was not sufficient. Bayley, J., said: "It is contended that the defendants are protected if they acted *bona fide* and to the best of their skill and judgment. But that is not enough; they are bound to conduct themselves in a skillful manner. And the question was most properly left to the jury to say whether the defendants had done all that any skillful person could reasonably be required to do in such a case." Compare Sutton v. Clarke, 6 Taunt. 29; 1 Marshall, 429; Weightman v. Washington, 1 Black, 39.

<sup>2</sup> Dunlop v. Munroe, 1 Cranch C. C. 336; affirmed on other grounds, 7 Cranch, 242; People v. Auditor, 2 Scamm. 567; Vaughn v. Biggers, 6 Geo. 188.

duty is assigned to an officer, the acts of the officer, within the scope of that duty, are *prima facie* taken to be within his power.<sup>1</sup>

§ 170. A *de facto* officer will not be allowed to urge, in defense of an action against him by a third person for his official acts, that he is not an officer *de jure*. Though his office may be void as to himself, it is valid as to strangers;<sup>2</sup> and if one assumes the duties of an office, his acts will operate by way of admission against him, and strict proof of his election or appointment will not be required.<sup>3</sup>

§ 171. A public officer who acts without authority, or in excess of his authority, is, like a private agent, personally responsible for every such act.<sup>4</sup> Ratification by the

<sup>1</sup> Strother v. Lucas, 12 Peters, 410; Ross v. Reed, 1 Wheat. 482; United States v. Arredondo, 6 Peters, 691; Philadelphia & Trenton R. Co. v. Stimpson, 14 Id. 448; Delassus v. United States, 9 Id. 117; Wilkes v. Dinsman, 7 How. [U. S.] 89; Minter v. Crommelin, 18 Id. 87; Russell v. Beebe, Hempst. 704; Den v. Hill, 1 McAll. C. C. 480; compare Ruggles v. Bucknor, 1 Paine, 358; Bottomley v. United States, 1 Story C. C. 135.

<sup>2</sup> Per Duncan, J., Riddle v. Bedford County, 7 Serg. & R. 386; see Dean v. Gridley, 10 Wend. 254; Green v. Burke, 23 Wend. 490, 502; Bentley v. Phelps, 27 Barb. 524; Burke v. Elliott, 4 Ired. [N. C.] Law, 355; Gilliam v. Reddick, 4 Id. 368; Schlencker v. Risley, 3 Scamm. 483; Plymouth v. Painter, 17 Conn. 585; Hoagland v. Culvert, 1 Spencer, 387; Farmers & Merchants' Bank v. Chester, 6 Humph. 458; compare Vaccari v. Maxwell, 3 Blatchf. C. C. 368.

<sup>3</sup> Where a public officer is sued for neglect, his acts may be given as evidence of his holding the office, though there be record evidence of his appointment (Dean v. Gridley, 10 Wend. 254). Giving a bond of office is an admission of appointment (Barada v. Carondelet, 8 Mo. 644; Lawrence v. Sherman, 2 McLean, 488; see State v. Allen, 21 Md. 516; Satterlee v. San Francisco, 23 Cal. 314). An officer *de facto* is one who executes the duties of an officer under some color of right, some pretense of title, either by election or appointment (Hooper v. Goodwin, 48 Maine, 79). Proof that an individual has acted notoriously as a public officer is *prima facie* evidence of his official character, without producing his appointment (Colton v. Beardsley, 38 Barb. 29; Allen v. State, 21 Geo. 217).

<sup>4</sup> Thus, case lies for illegally assessing and collecting taxes (Osgood v. Clark, 6 Foster, 307; Allen v. Archer, 49 Maine, 346; Perry v. Buss, 15 N. H. 222). But no presumption arises from the fact of an assessment that it was unlawful (Ib. See Bassett v. Porter, 10 Cush. 418). So trover will lie against a collector for an unauthorized sale of property (Thompson v. Currier, 4 Foster, 237; Wetmore v. Campbell, 2 Sandf. 341; Shaw v. Peckett, 25 Verm. 423; Pickering v. Coleman, 12 N. H. 148; Flanders v. Cross, 10 Cush. 514; but see Clark v. Axford, 5 Mich. 182; Champaign

government, or by a superior officer, of an unlawful act, will not relieve him from such liability, for, as we have already had occasion to remark,<sup>1</sup> the government cannot ratify an act of its officer which is clearly illegal, and which it could not itself have lawfully done, or authorized such agent to do. Thus, where a public officer (*e. g.*, a provost-marshal) exacts a pledge of property without authority of the government, an action will lie against him for its recovery; and the adoption of the act by his superior officer will not shield him.<sup>2</sup>

§ 172. While to omit to act when required, may be, as matter of morals, as much a violation of duty as to act wrongfully or negligently, there are in law some exceptions to the general rule that an officer is liable for *omitting* to act in a given case. In the first place, before a public officer can be made liable for omitting to do something, the obligation to do that thing must be absolute, specific, and imperative.<sup>3</sup> If the statute reposes a discretion in him, and he is made the sole judge of the necessity of action on

*Co. Bank v. Smith*, 7 Ohio St. 42; *Conwell v. Emrie*, 4 Ind. 209). A customs collector who demands from an importer a bond for the payment of duties for a greater amount than required by law, which the latter could not give, is answerable for the loss or deterioration of the property remaining in his hands (*Tracy v. Swartwout*, 10 Peters, 81; *Bond v. Hoyt*, 13 Id. 263; and see *Richardson v. Crandall*, 47 Barb. 335).

<sup>1</sup> *Ante*, § 137. An officer may, however, justify a trespass by showing that he was acting under the authority of the state, and obeying the orders of his superior officer (*Luther v. Borden*, 7 How. [U. S.] 1; *Despan v. Olney*, 1 Curt. C. C. 306). But the participation of an inferior officer in an act which he knows, or should know, to be illegal, will not be excused by the command of his superior (*Mitchel v. Harmony*, 13 How. [U. S.] 115; *United States v. Jones*, 3 Wash. C. C. 209).

<sup>2</sup> *Richardson v. Crandall*, 47 Barb. 335; see *Duanesburgh v. Jenkins*, 46 Id. 294; *Whitely v. Governor*, 6 Port. 335. It seems, however, that a contract made by a public officer, though made in excess of his authority, but not in violation of law, may be ratified by the state, with the same force and effect as the like act of a private agent, to enable the state to sue upon it (*State v. Buffalo*, 2 Hill, 434; and see *Nobree v. Rapiet*, 2 Bing. [N. C.] 796).

<sup>3</sup> *Bartlett v. Crozier*, 17 Johns. 439; *Wilson v. Mayor &c. of New York*, 1 Denio, 599; *Peck v. Batavia*, 32 Barb. 634; *Mills v. Brooklyn*, 32 N. Y. 489; *Cole v. Medina*, 27 Barb. 218; *Griffith v. Follett*, 20 Barb. 620.

his part in a given case, he cannot be made liable for the consequences of his judging no action to be necessary, no matter how erroneous his judgment may turn out to have been.<sup>1</sup> But where he is enjoined by certain and peremptory enactment to do a certain thing, an action will lie for his omission to do it.<sup>2</sup>

§ 173. So the duty to act does not attach until means are provided, or the officer has the coercive power of obtaining means, for the performance of the task,<sup>3</sup> especially in cases where the services of the office are coerced and uncompensated.<sup>4</sup>

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<sup>1</sup> See *ante*, §§ 127-130.

<sup>2</sup> Thus, where a statute directs that all damages which may be finally assessed or agreed upon by commissioners of highways for the laying out of any road, *shall* be laid before the board of supervisors of the county *by the supervisor of the town*, to be audited, &c., and such supervisor, though requested to do so by the plaintiff, refused to lay the plaintiff's damages as assessed before the board, it was held that an action would lie against such supervisor (*Clark v. Miller*, 47 Barb. 38). For other illustrations of the rule, see *ante*, § 131, *et seq.*

<sup>3</sup> *Garlinghouse v. Jacobs*, 29 N. Y. 297; *People v. Hudson*, 7 Wend. 474; *People v. Adsit*, 2 Hill, 619; *Barker v. Loomis*, 6 Id. 463. Town supervisors are not bound to build or repair bridges at their own expense, or under circumstances where they cannot make their town liable for the cost of the work (*Winslow v. Mt. Pleasant*, 16 Wisc. 613). As to averment in complaint of defendant's possession of sufficient funds, see *Griffith v. Follett* (20 Barb. 620).

<sup>4</sup> Though the fact that one acts gratuitously for the benefit of the public would not seem to be a reason for exempting him from liability for a negligent performance of a public duty (*Clothier v. Webster*, 12 C. B. [N. S.] 790; *Mersey Docks v. Gibbs*, Law Rep. 1 H. L. 93; 11 H. L. Cas. 686; 3 Hurlst. & C. [Amer. ed.] 1035). In *Bartlett v. Crozier* (17 Johns. 438), which was an action against an overseer of highways for neglecting to repair a bridge, it was held that no action lay against such officers under the New York statute, and some stress was laid on the circumstance that they are compelled, under a penalty, to hold office and receive no compensation. Kent, Chancellor, delivered the opinion of the court, and the grounds of his argument were: 1. That the duty of the commissioners under the act was not imperative and absolute, but indefinite, varied, and, to some extent, discretionary with the officer, and dependent upon a train of circumstances. 2. They were not supplied by the law with pecuniary means, nor with the coercive power requisite to meet and sustain a responsibility to each and every person who may sustain injury by reason of want of repair of their roads and bridges. 3. There was no precedent in the English law, nor under our colonial or state government, for sustaining any such private action against officers charged with repairing roads and bridges. In *Garlinghouse v. Jacobs* (29 N. Y. 297), Wright, J., was of opinion that "town commissioners of highways are, *in no event*,

§ 174. It is a general rule that, wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he has an interest in the performance of the duty, and that the duty was imposed for his benefit. Thus, where a statute required a postmaster to publish a list of uncalled-for letters in the newspaper having the largest circulation, the publisher of such a paper has not, as such, a sufficient interest in the performance of the duty to give him a right of action against the postmaster for its non-performance. The object of such a statute is rather to benefit those to whom letters are addressed, than the publishers of newspapers.<sup>1</sup> It has been contended that a public officer who

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liable to a private action for a mere neglect or omission to keep the highways of their towns in repair;" but only Denio, J., expressly agreed with him on that point, the other judges affirming the judgment on another ground. In *Holliday v. St. Leonard's Shoreditch* (11 C. B. [N. S.] 192), it appeared that the defendants were intrusted by statute with the superintendence of the paving of certain streets, and they were to receive no compensation therefor. Without any personal negligence on their part, their servants, who were in charge of the defendants' surveyor, negligently left a pile of stones in the street, over night, without guards or lights, whereby the plaintiff was injured. The court held that the defendants were not responsible. Byles, J., said: "Here the defendants are public officers, acting gratuitously and compulsorily, and having no fund out of which the damages could be paid; and the cases show that, under such circumstances, being guiltless of personal negligence, they are not liable." Erle, C. J., said: "Persons intrusted with the performance of a public duty, discharging it gratuitously, and themselves taking no share in the mode of its performance, are exempted from liability for the negligent acts of the persons employed by them." Blackburn, J., in *Mersey Docks v. Gibbs* (Law Rep. 1 H. L. 119), criticises this language, and says that the point actually decided here was, that there is an exception from the general rule making a master liable for the negligence of his servant, where the servant is employed by a public body. See *ante*, § 120, and *post*, § 177.

<sup>1</sup> *Strong v. Campbell*, 11 Barb. 135. The mere fact that one might have made a profit by the officer's performing a duty, if in reality he has sustained no loss by its non-performance, will not furnish a cause of action (*Ib.*) See *Foster v. McKibbin*, 1 Am. L. J. 411; see also *Butler v. King*, 19 Johns. 223; *Pank of Rome v. Mott*, 17 Wend. 556; *Ashby v. White*, 6 Mod. 51. It has been held that there is no privity of contract between a third person and one who contracts with the state for the performance of a public duty—*e. g.*, the keeping of a section of canal in repair—so as to give such third person a cause of action for a breach of the contract (*Fish v. Dodge*, 38 Barb. 163). But this doctrine has been entirely repudiated. Every individual member of the community is interested in the performance of such a contract, and any one specially injured by reason of its non-performance has a right of action for his

is employed by another to do an official act, is liable, for his omissions and negligences in doing it, to his immediate employer only, and not to third persons who may have been injured by such misconduct. This is not the rule as to strictly official acts. For example, where the owner of a foreign bill transmits the same for collection to a bank, which in turn gives it to a notary to present, and in case of non-acceptance or non-payment, to protest, the owner of the bill may look directly to the notary for any damages he may have sustained by reason of his failure to properly protest the bill.<sup>1</sup>

§ 175. Where the performance of a duty, specifically and imperatively imposed, is omitted, the fact that the officer intrusted it to some one else, who also neglected it, furnishes no excuse to the officer upon whom it was incumbent to see it done.<sup>2</sup> In such a case, no question of master and servant arises, for it is quite immaterial whether the person intrusted with the performance of the task was the officer's servant or not.

§ 176. The distinction adverted to in section 166, between that class of officers whose duties are of a general and public nature, and the other class whose duties are of a more private character, depending upon special employment, is to be borne in mind in determining the

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damages against the contractor (Robinson v. Chamberlain, 34 N. Y. 389; Phillips v. Commonwealth, 44 Penn. St. 187; Fulton Fire Ins. Co. v. Baldwin, 37 N. Y. 648; Sawyer v. Corse, 17 Gratt. 230. And see *post*, § 182).

<sup>1</sup> See the chapter on NOTARIES, *post*.

<sup>2</sup> Pickard v. Smith, 19 C. B. [N. S.] 480. Justice Williams aptly points out that the rule exempting independent contractors from liability for the acts of their servants is inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor by parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfillment, whereby an injury is occasioned. "If the performance of the duty be omitted, the fact of his having intrusted it to a person who also neglected it, furnishes no excuse either in good sense or law." And see Quarman v. Bennett, 6 Mees. & W. 509; *ante*, §§ 83, 84.

liability of public officers for the misconduct and negligence of their subordinates in office. All public officers who have the power of appointing their subordinates are bound to exercise ordinary care in selecting proper persons for the position, and to superintend their conduct;<sup>1</sup> and they are bound not to assign to them tasks for which they know such subordinates to be incompetent, and in the execution of which it is reasonable to infer that disastrous consequences will ensue.<sup>2</sup> But the first class of officers, if they are guiltless of personal negligence in the selection of their subordinates, are not answerable to third persons for the negligence or misfeasance of the clerks, servants, or agents, necessarily and properly employed by or under them<sup>3</sup> in the discharge of their official duties. The rule of *respondeat superior* does not apply to them, because the sub-agents which they are allowed or required to appoint become, by such appointment, like themselves, agents of the government,<sup>4</sup> and the liability of a servant of the public is no greater than the liability of the servant of any other principal, though recourse against the principal, the public, cannot be had by an action.<sup>5</sup> The second class, such as sheriffs, &c., are universally liable for the negligence and omissions of their deputies in the discharge of their official duties.<sup>6</sup>

§ 177. The rule that public officers are answerable for

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<sup>1</sup> *Dunlop v. Munroe*, 7 Cranch, 242.

<sup>2</sup> *Castle v. Duryea*, 32 Barb. 480; affirmed, 2 Keyes, 169.

<sup>3</sup> *Lane v. Cotton*, 1 Ld. Raym. 646; S. C., 12 Mod. 482; *Whitfield v. Despencer*, 2 Cowper, 754; *Rowning v. Goodchild*, 3 Wilson, 443; *Stock v. Harris*, 5 Burr. 2709; *McMillan v. Eastman*, 4 Mass. 378; *Schroyer v. Lynch*, 8 Watts, 455; *Nicholson v. Mounsey*, 15 East, 384; *Boulton v. Crowther*, 2 Barn. & Cr. 703; and see cases, *infra*.

<sup>4</sup> *Dunlop v. Munroe*, 7 Cranch, 242.

<sup>5</sup> Per Blackburn, J., *Mersey Docks v. Gibbs*, Law Rep. 1 H. L. 93, 111; 11 H. L. Cas. 686; 3 Hurlst. & C. [Amer. ed.] 1035.

<sup>6</sup> *Abrams v. Ervin*, 9 Iowa, 87. See our chapter on SHERIFFS, *post*.

their own personal malfeasances and misfeasances only, and not for those of their employees or agents, applies to every kind of public agency, by whatever name it may be called. It has frequently become a question as to who are servants of the public within the meaning of the rule. A system has long existed in England by which commissioners, appointed by the crown, are intrusted with the construction, custody, and care of public works, such as roads, harbors, street lighting, &c. The members of these commissions were not generally, until recently, incorporated, and their services were unattended by any compensation. To compel such officers to pay out of their own private means the damages resulting from the negligences and omissions of duty of the numerous servants and agents in their employ, was felt to be a great hardship. And on grounds of public policy, the courts, considering them servants of the public, placed them under the protection of the rule, and exempted both their personal and their trust funds from liability. As was asked by a learned judge,<sup>1</sup> "If the doctrine of *respondeat superior* were applied to such commissioners, who would be hardy enough to undertake any of these various offices, by which much valuable but unpaid service is rendered to the country?" A great number of cases will be found in the English reports adopting and applying this principle.<sup>2</sup>

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<sup>1</sup> Best, C. J., *Hall v. Smith*, 2 Bing. 156.

<sup>2</sup> Thus, in an action against the trustees for maintaining, watching, and lighting a public street, for injuries sustained by plaintiff's wife in consequence of having fallen over a heap of dust deposited in the highway without any light or signal being placed over it, the court held that the trustees were not liable in damages, they being so far removed from the cause of it (*Harris v. Baker*, 4 Maule & Sel. 26). The same principle is applicable to trustees of a turnpike. Thus, in a case where the plaintiff, while driving along a road at night, had his carriage overturned by coming in contact with a heap of stones placed on the road by servants of a contractor in the employ of the defendants, the road trustees, and his son was killed, it was held, by the House of Lords, that the defendants were not liable (*Findlater v. Duncan*, 6 Clark & Fin. 903). The rule in this case was followed in another case, where the defendants were trustees for improving the navigation of the Clyde. The plaintiff's vessel was moored in a



§ 178. But the questions involved in these cases have recently undergone a thorough examination in the House of Lords,<sup>1</sup> and it is pointed out that the principle upon

berth in the Broomielaw harbor, by a servant of the defendants, and, in consequence of carelessness of the defendants' servants in deepening the harbor next to said berth, the vessel sustained injury. The plaintiff arguing that there was an implied contract to keep the harbor in repair, the court said that "in such cases, where the funds are appropriated by statute to specific purposes, and every other application of them prohibited, there is no implied contract which entitles any party to attach them for any damage or failure of duty committed by subordinate servants. The remedy is against the individuals who committed the wrong, and not against the trustees" (*New Clyde Shipping Co. v. River Clyde Trustees*, Hay, 79; 14 Jur. 586. And see *Heriot's Hospital v. Ross*, 12 Clark & Fin. 507). The same rule was adopted in the Scotch cases, *Ainslie v. Stewart* (12 Jur. 178; Hay, 70); and *Gordon v. Davie* (12 Jur. 243; Hay, 70). By a local act of Parliament for better preserving a harbor, trustees were appointed for carrying out the act. They acted gratuitously: the property in the harbor was vested in them, and they were empowered to elect a harbor-master and other officers and servants connected with the harbor, with power to discharge them. The harbor-master was empowered to direct the situation in which a vessel entering the harbor was to be moored. The trustees were also empowered to make by-laws as to the management of the harbor, and to impose tonnage rates upon vessels using it, and to borrow money on the security of such rates, and to apply the proceeds in payment of the interest of the money so borrowed, and of the costs and expenses attending the carrying into execution the purposes of the act connected with the harbor, and also in the reduction of the capital borrowed. Held, that the trustees were not liable either, first, for the acts of the harbor-master, in directing a vessel to be moored in an improper place whereby it received damage, or, secondly, for an injury occasioned to a vessel by an accumulation of rubbish in the harbor (*Metcalfe v. Hetherington*, 11 Exch. 257; S. C. again, 5 Hurlst. & N. 719. And see *British Cast Plate Manuf. Co. v. Meredith*, 4 T. R. 794; *Humphreys v. Mears*, 1 Man. & Ryl. 187; *Boulton v. Crowther*, 2 Barn. & Cr. 703; *Coe v. Wise*, 5 Best & S. 440; reversed, Law Rep. 1 Q. B. 711; *Holliday v. St. Leonard's Shoreditch*, 11 C. B. [N. S.] 192). Under the English statute, a surveyor of highways is not personally responsible for injury arising from non-repair of the highway (*Young v. Davies*, 2 Hurlst. & N. 197; 7 Id. 760).

<sup>1</sup> *Mersey Docks v. Gibbs*, Law Rep. 1 H. L. 93; 11 H. L. Cas. 686; 3 Hurlst. & C. [Amer. ed.] 1035; affirming S. C., 3 Hurlst. & N. 164; *Coe v. Wise*, Law Rep. 1 Q. B. 711; reversing S. C., 5 Best & S. 440. In the first case, the trustees of the Mersey Docks were a corporation receiving tolls for the purpose of discharging a public duty from which the members derived no emolument, and they had a discretion as to the application of the funds, and as to the time and manner in which they were to repair the docks. A declaration against the trustees alleged, first, that they were the proprietors of a certain dock, which was made by them under certain acts, under which they received from vessels certain tolls, which under said acts they were bound to apply in and about (amongst other things) the maintaining the dock so as to be in a fit state for vessels entering the same. Averment: That the funds in their hands arising from the said tolls were sufficient for maintaining the dock. Breach: That they did not take reasonable or any care in or about maintaining, &c., the dock, inasmuch that the plaintiff's vessel struck on the mud which lay at the entrance of the

which most of the cases is based—namely, the harshness and impolicy of casting on individuals a public duty, and making them responsible out of their private means for the non-fulfillment of it—is now quite inapplicable, inasmuch as it has been the practice of the legislature for many years past to exempt the private means of such commissioners from liability, either by incorporating them, or by enabling them to sue and be sued in the name of a clerk, and restricting the execution to the property which they hold as commissioners. The rule, therefore, as now fixed by the highest English authority,<sup>1</sup> is that commission-

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dock, and in consequence thereof the cargo was damaged. The second count alleged that the defendants, well knowing that the dock and the entrance thereto were unfit for navigation, did not take reasonable or any care to put the same into a fit state for that purpose, but negligently permitted it to continue in an unfit state for want of reasonable cleansing, insomuch that the vessel in question, in endeavoring to enter, struck against a bed of mud, and was damaged, together with the cargo. On demurrer to the declaration, it was held that the defendants were liable, since, though it might be doubted whether the declaration declared a state of facts under which they had a positive duty to perform, or merely a discretion to exercise, as to removing the danger, yet, at all events, if they had a discretion under the circumstances to let the danger continue, they ought, as soon as they knew of it, to have closed the dock to the public; and that under such circumstances the duty is equally cast on those who have the receipt of the tolls and management of the dock, whether the tolls are received for a beneficial or a fiduciary purpose. In another case, under a statute (10 and 11 Vict. c. 34, s. 52) which imposed on the commissioners elected under the act the duty of fencing footpaths, if needed for the protection of passengers, and leaves them no discretion, it was held that such commissioners were liable in their corporate capacity to an action at the suit of a person injured by their negligent omission to fence a footpath (*Ohrby v. Ryde Commissioners*, 5 Best & S. 743).

<sup>1</sup> *Mersey Docks v. Gibbs*, Law Rep. 1 H. L. 93; 11 H. L. Cas. 686; 3 Hurlst. & C. [Amer. ed.] 1035; *Ward v. Lee*, 7 El. & B. 426; *Coe v. Wise*, Law Rep. 1 Q. B. 711; *Clothier v. Webster*, 12 C. B. [N. S.] 790; *Southampton &c. Bridge Co. v. Southampton Board of Health*, 8 El. & B. 801; *Ruck v. Williams*, 3 Hurlst. & N. 308; *Whitehouse v. Fellowes*, 10 C. B. [N. S.] 765. In the last case, it was held that an action would lie against the trustees of a turnpike company sued in their quasi-corporate capacity for negligence in the manner in which they had caused drains to be built. And in *Brownlow v. Metropolitan Board* (13 C. B. [N. S.] 768), it was decided that an action would lie against a board of public works for the injury sustained by a shipowner by reason of the improper construction of a sewer in the bed of the Thames. In *Ruck v. Williams* (3 Hurlst. & N. 308), Baron Bramwell said: "I can well understand that if a person undertakes the office or duty of a commissioner, and there is no means of indemnifying him against the consequences of a slip, it is reasonable to hold that he should not be responsible for it. I can also understand that

ers or trustees sued in their corporate character, and not affected personally by the result of the action, are liable in that character to one who suffers from the wrongful acts or omissions of their servants, agents, or employees. In other words, they are not, properly speaking, public officers, and the rule that holds public officers not answerable for the acts of inferior servants has no application to the case of trustees incorporated for the public benefit.

§ 179. In an early case in New York,<sup>1</sup> which has been followed ever since, it was held that overseers of highways, whose services are coerced and uncompensated, who have no powers to raise money in an emergency, and whose duties under the statute are not, to say the least, specific and imperative, are not liable in a civil action for injuries sustained in consequence of their neglect to keep a bridge in repair. Although in that case, it is not assigned as a reason for their non-liability that they are not incorporated, yet it has been since uniformly held that such officers (*e. g.*, the trustees of a village) are, when they become a corporate body, liable in their corporate character, not only for their own malfeasances, negligences,

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if one of several commissioners does something not within the scope of his authority, the commissioners as a body are not liable; but where commissioners, who are a quasi-corporate body, are not affected (*i. e.*, personally) by the result of the action, inasmuch as they are authorized by act of Parliament to raise a fund for payment of the damages, on what principle is it that if an individual member of the public suffers from an act *bona fide*, but erroneously done, he is not to be compensated? It seems to me inconsistent with actual justice, and not warranted by any principle of law."

<sup>1</sup> Bartlett v. Crozier, 17 Johns. 438. The Chancellor says: "When the law renders a public officer liable to special damages for neglect of duty, the cases are those in which the services of the officer are not uncompensated or coerced, but voluntary and attended with compensation, and where the duty to be performed is entire, absolute, and perfect." Where the duty is very imperfect, and depending on contingencies for its creation, and resting much on discretion in its performance—*e. g.*, the duty of highway officers to repair bridges, which depends on their having funds applicable—an action will not lie (*Ib.*) In New Jersey, no action lies against the board of chosen freeholders for injuries in consequence of their not completing or repairing a county bridge (*Cooley v. Essex*, 3 Dutch. 415).

and omissions of duty, but for those of their agents and servants in the line of their employment.<sup>1</sup>

§ 180. To further illustrate the rule, a postmaster is answerable for his own negligence, whereby a letter is lost, but he is not answerable if the loss ensues from the negligence of his clerks or other subordinates.<sup>2</sup> In an early case, it was sought to make the postmaster-general of England liable for the value of exchequer bills which were abstracted from a letter deposited by the plaintiff in the London post-office. The person who received the letter at the post-office was appointed and was removable by the defendant, but he received his salary out of the public treasury. The court held that the post-office establishment was an instrument of government, established for public convenience, and that the person who received the letter from plaintiff's hands was an officer of the government, and liable as such for his own acts, and was not the agent or servant of the postmaster-general.<sup>3</sup> And this doctrine has been adopted and followed in subsequent cases, both in England and in this country.<sup>4</sup> An action has been maintained against a postmaster for the acts of

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<sup>1</sup> *Hickok v. Plattsburgh*, 16 N. Y. 161, note; *Conrad v. Ithaca*, Id. 158; *Weet v. Brockport*, Id. note; see *Cole v. Medina*, 27 Barb. 218; *Peck v. Batavia*, 32 Id. 634; see *ante*, § 149.

<sup>2</sup> *Schroyer v. Lynch*, 8 Watts, 453; *Wiggins v. Hathaway*, 6 Barb. 632; *Dunlop v. Munroe*, 7 Cranch, 242; *Bolan v. Williamson*, 1 Brevard, 181; see *Franklin v. Low*, 1 Johns. 396. Case will lie against a postmaster for not delivering a letter on request, but not if postage was not paid on tender of the letter (*Edwards v. Dickinson*, 12 Mod. 6). When issue is taken on the negligence of the postmaster himself, it is not competent to give in evidence the negligence of his assistants (*Dunlop v. Munroe*, 7 Cranch, 242).

<sup>3</sup> *Lane v. Cotton*, 1 Ld. Raym. 646.

<sup>4</sup> In *Whitfield v. Despencer* (2 Cowp. 765), Lord Mansfield said: "As to an action on the case lying against the party really offending, there can be no doubt of it; for whoever does an act by which another person receives an injury is liable in an action for the injury sustained. If the man who receives a penny to carry the letters to the post-office loses any of them, he is answerable; so is the sorter in the business of his department; so is the postmaster for any fault of his own."

one whom he permitted to have the care and custody of the mail in his office, not having been sworn according to law;<sup>1</sup> and for the purpose of establishing negligence on the part of a postmaster, it is competent to prove how the office was kept, its exposed position, and the probability arising therefrom that the loss was the consequence of such exposure.<sup>2</sup>

§ 181. Officers of the army and navy are within the protection of the rule, and are not responsible for the misfeasances or negligences of the subordinate officers under them. Thus it has been held that the captain of a sloop of war is not answerable for damage done by her running down another vessel: the mischief appearing to have been done during the watch of the lieutenant, who was upon deck, and had the actual direction and management of the steering and navigating of the sloop at the time, and when the captain was not upon deck, and was not called by his duty to be there.<sup>3</sup>

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<sup>1</sup> Bishop v. Williamson, 2 Fairf. 495. And of course a deputy postmaster is liable for a loss sustained by his personal negligence in office (Maxwell v. McIlvoy, 2 Bibb, 211; Rowning v. Goodchild, 3 Wilson, 443; see Dox v. Postmaster-General, 1 Pet. 318). As to the liability of contractors for carrying the public mail, see *post*, § 182.

<sup>2</sup> Ford v. Parker, 4 Ohio St. 576.

<sup>3</sup> Nichol森 v. Mounsey, 15 East, 384. No action can be maintained against the owners of a transport vessel, employed by the government, for damage done in the execution of positive orders of an officer of the royal navy, under whose command she was. "This immunity does not depend, upon martial law, but on the ground that persons acting under such orders cannot be said to be guilty of negligence" (Hodgkinson v. Fernie, 2 C. B. [N. S.] 415). In Castle v. Duryea (32 Barb. 480; affirmed, 2 Keyes, 169), it appeared that a regiment, under the command of the defendant, its colonel, was, pursuant to official orders, going through the evolutions of a drill upon a public parade-ground, in the presence of a large number of spectators. The defendant, in the course of the drill, standing in front of the middle of the regiment, ordered his men to bring their muskets to a horizontal position, and aimed in the direction of the crowd in front. From this position, the defendant gave the order to *fire*: whereupon the guns, supposed to be loaded only with blank cartridges, were discharged, and the plaintiff's wife was seriously, and the child in her arms fatally, wounded by a musket ball. The court charged the jury, among other things, that no action could be maintained against the defendant for an act done by him in the execution of his office, and within the scope of his authority, if done with all reason-

§ 182. It has been urged in some of the reported cases that all independent contractors with the government for the performance of public services are the agents of the government, and that on this ground the doctrine of *respondet superior* as to their employees does not apply to them. Thus, it has been held that a contractor for carrying the mail, being a public officer, is exempt, under the rule, from liability for the negligence of his agent in carrying the mail;<sup>1</sup> but this application of the rule is sustainable neither by authority, nor on principle; and in a late well-considered case in Virginia, after a candid examination of authorities, the conclusion was reached that mail contractors are not public officers within the scope of the rule which exempts public officers from liability for the negligence of their official subordinates, and that if such a contractor employs either a faithless or incompetent servant, or one through whose negligence a letter is lost, the sender of the letter has an action against the contractor.<sup>2</sup> They are liable to the same extent as other masters, but no further, for the negligence and malfeasance of their servants.<sup>3</sup>

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able care and caution; nor was he responsible for the negligence of those under his command, unless he made himself a party to the negligence by giving an improper order, or by neglecting to give a proper order, or by neglecting some precaution which prudence required him to adopt. The jury returned a verdict for the plaintiff and the charge of the judge was sustained on appeal.

<sup>1</sup> Conwell v. Voorhees, 13 Ohio, 523; Hutchins v. Brackett, 2 Foster, 252.

<sup>2</sup> Sawyer v. Corse, 17 Gratt. 230. In Collett v. London &c. R. Co. (16 Q. B. 984), the defendants had been required by the postmaster-general to carry the mail, under the act making it the duty of all railroad companies to carry the mail when required to do so by the postmaster-general. The plaintiff was an officer of the post-office department accompanying the mail, whom the defendants were bound to carry along with the mail. It was held that the plaintiff was entitled to recover against the defendants for an injury suffered by reason of the negligence of their servants in charge of the train.

<sup>3</sup> Robinson v. Chamberlain, 34 N. Y. 389; Fulton Fire Ins. Co. v. Baldwin, 37 Id. 648; Phillips v. Commonwealth, 44 Penn. St. 187; Pack v. Mayor &c. of New York, 8 N. Y. 222; Kelly v. Mayor &c. of New York, 11 N. Y. 432; compare Blake v. Ferris, 5 Id. 48; and Fish v. Dodge, 38 Barb. 163. See *ante*, §§ 15, 75, 81-88.

§ 183. Where any of the functions of a public officer become vested in private persons, such officer is relieved from responsibility for the acts or omissions of such persons, in the exercise of those functions, notwithstanding he may be intrusted with a general oversight and supervision of their conduct. And where one officer is bound to do certain work, and another to pay for it, the former only is liable for its non-performance. Thus, where, by a local act, a waterworks company was bound, at the request of town improvement commissioners, to put fire plugs into their mains, and afterward keep them in repair, at the cost of the commissioners, in whom the property of the plugs was vested, it was held that the waterworks company, and not the commissioners, were liable for injuries resulting to another from the non-repair of a plug-hole in such pipe.<sup>1</sup>

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<sup>1</sup> Bayley v. Wolverhampton Waterworks Co., 6 Hurlst. & N. 241. An act enabling navigation commissioners to grant a lease of a canal, contained a clause providing that in case the lessees during the term should permit the navigation to be out of repair, the commissioners were authorized and required to give notice thereof to such lessees, &c., and in such notice to specify the particular repairs which ought to be done; and the commissioners might by such notice require that such repairs should be commenced, proceeded with, and finished within reasonable periods to be named by the commissioners, and, in case the lessees should neglect to commence, &c., such repairs, &c., then it should be lawful for the commissioners, and they were authorized to take possession of the tolls, &c., and to cause such repairs to be done under their own direction, and to pay the necessary expenses of making such repairs out of the said tolls, &c. The lease having been granted in pursuance of the act, during its continuance one of the locks of the canal became out of repair, but the commissioners, though they knew of the want of repair, gave no notice of it to the lessee, though a sufficient time had elapsed for the giving of such notice. A barge entered the canal while the lock was so out of repair, but was prevented from getting out again by the falling in of the lock. Held, that no action lay by the owner of the barge against the navigation commissioners for neglecting to give notice to the lessees to repair, on the ground that the detention of the barge was not a damage naturally flowing from the neglect of the commissioners to give notice: it not being shown that if such notice had been given, the lessees would have repaired, or that the commissioners would have taken possession and repaired. And on appeal, affirming that decision, it was held that, assuming a duty in the commissioners to give notice to the lessee to repair, they were not liable in an action by the owner of the barge for neglecting to give such notice, inasmuch as the detention of the barge was not a damage naturally flowing from their neglect. *Semble*, that no action was maintainable against the commissioners for their neglect to give notice (Walker v. Goe, 4 Hurlst. & N. 350; affirming S. C., 3 Id. 395).

§ 184. The next matter to which we might be expected to turn our attention under the title of this chapter would be the liabilities of the second class of officers to which we have referred, such as sheriffs, notaries, county clerks, &c. It is, however, more in harmony with our plan to defer any consideration of the liabilities of particular officers to other parts of this work; and the reader is, therefore, referred to the chapters on CLERKS AND REGISTERS, SHERIFFS, NOTARIES PUBLIC, &c.



## PART III.

### PARTICULAR CASES OF NEGLIGENCE.

- CHAPTER X. ANIMALS (INJURIES BY).
- XI. ATTORNEYS AND COUNSELLORS AT LAW.
  - XII. BANKERS AND BILL COLLECTORS.
  - XIII. BRIDGES.
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  - XVII. DEATH (INJURIES CAUSING).
  - XVIII. DRIVING AND RIDING.
  - XIX. FENCES.
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  - XXIX. SHERIFFS.
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## CHAPTER X.

### INJURIES BY ANIMALS.

- SEC. 185. Owner of animals liable for injuries committed by them.
- 186. Owner's liability for animal's trespass.
  - 187. Liability on ground of notice of disposition.
  - 188. Notice of disposition, when presumed.
  - 189. What will be deemed sufficient notice.
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  - 193. Keeping infectionously diseased animals.
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- 194a. Injuries by animals straying on railroads.
- 195. Who will be deemed the owner of an animal.
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- 199. Contributory fault of plaintiff.
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- 202. Liability for sheep-killing dogs in New York, &c.
- 203. Liability for dogs generally.
- 204. English statutory liability for dogs.
- 205. Injuries to a dog fighting another.
- 206. Evidence of identity of dog committing injury.
- 207. Statutory rule as to ownership in New York.
- 208. Other statutory rules as to ownership.

§ 185. The owner of an animal is liable for injuries which by his negligence he suffers it to commit; and, except in some cases provided for by statute (which will be hereafter separately considered), he is not liable for the acts of the animal upon any other ground than that of negligence, actual or presumed.<sup>1</sup> If he has done all that he or any other man in his circumstances reasonably could, to prevent injury, he is not liable.<sup>2</sup> And, indeed, he is only answerable for the want of ordinary care.<sup>3</sup>

§ 186. The owner of an animal is under an unqualified obligation, at common law, to restrain it from trespassing upon the land of other persons. And he is, therefore, unconditionally liable as a trespasser himself, for any trespass committed by his animate property:<sup>4</sup> the law conclusively

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<sup>1</sup> *Van Leuven v. Lyke*, 1 N. Y. 515; 4 Denio, 127; *Wheeler v. Brant*, 23 Barb. 324; *Buckley v. Leonard*, 4 Denio, 500.

<sup>2</sup> *Scribner v. Kelley*, 38 Barb. 14; *Earl v. Van Alstine*, 8 Barb. 630; *Coeke v. Waring*, 2 Hurlst. & C. 332; see *Tift v. Tift*, 4 Denio, 175; *May v. Burdett*, 9 Q. B. 101.

<sup>3</sup> *Meredith v. Reed*, 26 Ind. 334.

<sup>4</sup> *Van Leuven v. Lyke*, 1 N. Y. 515; affirming S. C., 4 Denio, 127; *Dunckle v. Kocker*, 11 Barb. 387; *Stafford v. Ingersol*, 3 Hill, 38; *Wells v. Howell*, 19 Johns. 385; *Lee v. Riley*, 18 C. B. [N. S.] 722; *Angus v. Radin*, 2 South. 815; *Dolph v. Ferris*, 7 Watts & S. 367; *Pope v. Hollingsworth*, 7 Ind. 317; *Beckwith v. Shoredike*, 4 Burr. 2092; see *Cox v. Burbidge*, 13 C. B. [N. S.] 430, 438, per Williams, J. Even the fact that the defendant's animal was unlawfully taken out of his close by a

presuming negligence against him, without regard to the facts of the particular case. Whatever damage his animal does while trespassing, is an aggravation of the trespass, for which he is also liable.<sup>1</sup> The modification of this rule, by the law of various states concerning the maintenance of fences, will be considered in the chapter on FENCES.

§ 187. For injuries willfully committed by animals, when not trespassing, the owner is liable if he had previous notice that their nature was such as to make it probable that they would commit injuries of a similar character, and failed to take proper precautions<sup>2</sup> against

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stranger is no defense, if, after being left by the stranger, it strayed upon the plaintiff's close (*Noyes v. Oolby*, 10 Foster, 143). But in *Cooke v. Waring* (2 Hurlst. & C. 332), the plaintiff was nonsuited, on the ground that no negligence was proved, although it clearly appeared that the defendant's animals were on the plaintiff's land when they committed the injury complained of. And it is doubtful whether the rule extends to dogs, cats, and smaller animals (see *Read v. Edwards*, 17 C. B. [N. S.] 245).

<sup>1</sup> *Ib.* The communication of an infectious disease by trespassing cattle is such matter of aggravation (*Barnum v. Vandusen*, 16 Conn. 200; *Anderson v. Buckton*, 1 Strange, 192). The plaintiff turned his horse into his own pasture. During the night the horse of the defendant, which was running loose upon the highway, broke into the plaintiff's close, and killed the plaintiff's horse. Held, that trespass could be maintained by the plaintiff, even if the defendant had no knowledge of the vicious properties of his horse, because the horse was wrongfully in the plaintiff's close (*Decker v. Gammon*, 44 Maine, 322).

<sup>2</sup> See *Wheeler v. Brant*, 23 Barb. 324; *Buckley v. Leonard*, 4 Denio, 500; *Loomis v. Terry*, 17 Wend. 496; *Koney v. Ward*, 2 Daly, 295; 36 How. Pr. 255; *Woolf v. Chalker*, 31 Conn. 121; *Kittridge v. Elliott*, 16 N. H. 77; *Coggsell v. Baldwin*, 15 Verm. 404; *Stumps v. Kelley*, 22 Ill. 140; *Read v. Edwards*, 17 C. B. [N. S.] 245; *Jackson v. Smithson*, 15 Mees. & W. 563. The plaintiff, a boy, while riding on a gray horse, drove some cows from pasture, and left the gate open, although he had been warned not to do so, as a bull kept in the pasture would follow the cows. He knew that the bull disliked gray horses, and frequently made attempts to gore them, though in other respects not vicious. The bull having passed the gate, attacked the horse and injured the plaintiff. Held, that if the plaintiff knew that the animal was dangerous, he could not recover; but that if the defendant was negligent in not properly confining the bull, knowing him to be dangerous, the plaintiff could recover, unless he was culpably negligent (*Earhart v. Youngblood*, 27 Penn. St. 327). In that case, Lowrie, J., said: "The rule is very plain and very just that the owner of an animal known to be vicious must take sufficient precautions that it shall do no injury to the public: it must be so confined that strangers may pursue their own objects with security from it. The public are entitled to act

such acts on their part, but not otherwise.<sup>1</sup> This liability of the owner is not confined to acts proceeding from a vicious disposition in the animal; although the rule is often so stated as to create this impression. He is as much bound to take precautions against injuries which the animal may commit in mere playfulness, as against those which spring from a vicious intent. Thus, if the owner of a horse knows that it is given to kicking in mere sport, it is as much his duty to restrain it from doing injury thereby, as it would be if it kicked from bad temper and malice.<sup>2</sup>

§ 188. For the purposes of a civil action, every person in possession of an animal is conclusively presumed to have notice of the disposition and habits which are universal among that *species* of animals;<sup>3</sup> but there is no presumption of any kind as to his knowledge of the disposition or habits peculiar to his particular animals. Therefore, the owner of wild and savage beasts, such as lions, tigers, wolves, bears, &c., if he neglects to keep them properly secured, is liable for injuries committed by them according to their nature, without any evidence that he

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upon the presumption that all dangerous animals are properly confined, and are, therefore, exonerated from any special caution against them, except when without right they go upon their owner's land, and within the place where they may be lawfully kept."

<sup>1</sup> See *Scribner v. Kelley*, 38 Barb. 14; *Van Leuven v. Lyke*, 1 N. Y. 515; *Cox v. Burbridge*, 13 C. B. [N. S.] 430.

<sup>2</sup> *Dickson v. McCoy*, 39 N. Y. 400.

<sup>3</sup> *Besozzi v. Harris*, 1 Fost. & F. 92. This is evidently the principle upon which the decisions on this subject rest, though we do not find it any where stated in precisely this form. In *Van Leuven v. Lyke* (1 N. Y. 515), the rule is stated thus: "It is a well-settled principle that in all cases where an action of trespass on case is brought for mischief done to the person or personal property of another by animals *mansuetæ naturæ*, such as horses, oxen, cows, sheep, swine, and the like, the owner must be shown to have had notice of their viciousness before he can be charged, because such animals are not by nature fierce or dangerous; and such notice must be alleged in the declaration; but as to animals *feræ naturæ*, such as lions, tigers, and the like, the person who keeps them is liable for any damage they may do, without notice, on the ground that by nature such animals are fierce and dangerous."

knew them to be ferocious,<sup>1</sup> or that he was negligent in his mode of keeping them,<sup>2</sup> since he is bound in ordinary prudence to know that fact, and to secure them from doing harm. But the owner of creatures which as a species are harmless and domesticated, and are kept for convenience or use,<sup>3</sup> such as dogs,<sup>4</sup> cattle,<sup>5</sup> horses,<sup>6</sup> and even bees,<sup>7</sup> is not liable for injuries willfully committed by them, unless he is proved to have had notice of the inclination of the particular animals complained of to commit such injuries.<sup>8</sup> If, having had such notice, he neglects to keep them confined where no one can suffer from them while using ordi-

<sup>1</sup> So held, in the case of a bear, which was confined by a chain, and had for a long time been tame and docile in its habits (*Besozzi v. Harris*, 1 Fost. & F. 92).

<sup>2</sup> The declaration alleged that the defendant *kept* a monkey which he knew to be dangerous and inclined to bite, and that it did attack and bite the plaintiff. Held sufficient without alleging negligence in keeping the monkey. *Denman*, C. J., said: "Whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is, *prima facie*, liable in an action on the case, at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities" (*May v. Burdett*, 9 Q. B. 101; see *Van Leuven v. Lyke*, 1 N. Y. 515; *Scribner v. Kelley*, 38 Barb. 14; *Earl v. Van Alstine*, 8 Barb. 630).

<sup>3</sup> This is the expression used in *Vrooman v. Lawyer* (13 Johns. 339), and cited with approval in *Earl v. Van Alstine* (8 Barb. 630, 636). In *Smith v. Causey* (22 Ala. 568), a very similar phrase is used.

<sup>4</sup> *Fairchild v. Bentley*, 30 Barb. 147; *Steele v. Smith*, 3 E. D. Smith, 321; *Thomas v. Morgan*, 1 Cr., M. & R. 496; *Woolf v. Chalker*, 31 Conn. 121; *Kinnion v. Davies*, Cro. Car. 487; see *Hinckley v. Emerson*, 4 Cow. 351; *Anon.*, *Dyer*, 25 b.; *Hartley v. Harriman*, 1 B. & Ald. 620; *Fleming v. Orr*, 29 Eng. L. & E. 16; 2 Macq. H. L. 14; *Card v. Case*, 5 C. B. 622.

<sup>5</sup> *Van Leuven v. Lyke*, 1 N. Y. 515; *Vrooman v. Lawyer*, 13 Johns. 339; *Jackson v. Smithson*, 15 Mees. & W. 563; *Buxenden v. Sharp*, 2 Salk. 662; *Clark v. Armstrong*, 24 Scotch Sess. C. 1315. But it has been held that persons driving cattle through a city street are bound to use the utmost diligence and care to avoid injuries to passers-by. Their liability is like that of common carriers (*Ficken v. Jones*, 28 Cal. 618).

<sup>6</sup> *Cox v. Burbridge*, 13 C. B. [N. S.] 430.

<sup>7</sup> *Earl v. Van Alstine*, 8 Barb. 630.

<sup>8</sup> *Van Leuven v. Lyke*, 1 N. Y. 515; *Fairchild v. Bentley*, 30 Barb. 147; *Earl v. Van Alstine*, 8 Barb. 630; *Vrooman v. Lawyer*, 13 Johns. 339; *Cox v. Burbridge*, 13 C. B. [N. S.] 430; *Stiles v. Cardiff Steam Nav. Co.*, 33 L. J. [Q. B.] 310.

nary care, he is liable for all injuries committed by them.<sup>1</sup> And the owner of even a wild beast is not liable for injuries caused by it in a manner which no acquaintance with its nature could have led him to expect, except upon similar evidence of notice.<sup>2</sup> The owner of any kind of animal, whether it be wild or tame, is chargeable with notice of its generic disposition to stray, and liability to take fright. If its size and speed are such as to make it dangerous, under such circumstances, the owner is bound to use ordinary care to keep it from straying; and if he neglects to do so, he will be liable for all injuries committed by it while straying, which he ought in prudence to have foreseen as likely to occur. For this reason, the owner of a horse is liable for damage done by it in running away, if he has not used due diligence to prevent its escape;<sup>3</sup> and this, even though the immediate cause of the horse's running away was the wrongful act of a stranger.<sup>4</sup> If, however, the owner of a tame and domestic animal has used ordinary care in its management, he is not liable for the injuries which it accidentally commits while in a place in which it may lawfully be.<sup>5</sup>

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<sup>1</sup> So held in cases of injuries by dogs (*Wheeler v. Brant*, 23 Barb. 324; *Buckley v. Leonard*, 4 Denio, 500; *Loomis v. Terry*, 17 Wend. 496; *Read v. Edwards*, 17 C. B. [N. S.] 245; *Marsh v. Jones*, 21 Verm. 378; *Sherfey v. Bartley*, 4 Sneed, 58; *Burden v. Barnett*, 7 Ala. 169; *McCaskill v. Elliott*, 5 Strobb. 196) and cattle (*Stumps v. Kelley*, 22 Ill. 140; *Hudson v. Roberts*, 6 Exch. 697). If the owner of a dangerous but domestic animal keeps it properly secured, he is not liable for injuries committed by it upon being let loose by another person (not being his servant) without his authority (*Fleming v. Orr*, 2 Macq. H. L. 14; 29 Eng. L. & E. 16).

<sup>2</sup> So held, where the plaintiff's horse was frightened by the mere sight of the defendant's elephant (*Scribner v. Kelley*, 38 Barb. 14).

<sup>3</sup> *McCahill v. Kipp*, 2 E. D. Smith, 413.

<sup>4</sup> If a horse and cart are left standing in the street of a city, without any person to watch them, the owner is liable for any damage done by the horse in running away, though the act of a passer-by, in striking the horse, was the immediate cause of its starting (*Tindal, C. J.*, *Illidge v. Goodwin*, 5 Carr. & P. 190; compare, however, *Hayman v. Hewitt*, Peake Add. Cas. 170). It is of course otherwise, where the owner has kept due care of the horse (*Weldon v. N. Y. & Harlem R. Co.*, 5 Bosw. 576).

<sup>5</sup> *Sullivan v. Scripture*, 3 Allen, 564; *Weldon v. N. Y. & Harlem R. Co.*, 5 Bosw. 576. See further upon this subject, *post*, § 194.

§ 189. It is not necessary that the owner of an animal should have any formal notice, or positive knowledge, of its vicious habits or disposition, in order to make him liable for its acts. It is sufficient if he has seen or heard of things which would suffice to convince a man of ordinary prudence that the animal was ill-disposed. But notice of the fact to a servant, in order to charge the master, must be communicated to a servant whose duty required him to inform his master, and whose admissions would be competent evidence against him.<sup>1</sup>

§ 190. It is not necessary that the acts of aggression brought to the notice of the owner should be precisely similar to that upon which the action against him is founded.<sup>2</sup> But it is necessary that the facts thus brought to his notice, should indicate a disposition to commit injuries substantially like those which form the basis of the claim against the owner.<sup>3</sup> Thus, in an action founded upon injuries inflicted by a dog upon a man, proof of the owner's knowledge that the dog had worried sheep would not suffice, since thousands of curs, who would not dare to touch a man, delight in attacking sheep. It might even be doubted whether such evidence would suffice in an action upon injuries to oxen; though we should think that great ferocity in attacking sheep might imply a disposition to attack cattle. On the other hand, proof of a habit on the part of a dog to attack large cattle might well imply his disposition to injure smaller animals.<sup>4</sup> It would at any rate throw

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<sup>1</sup> See *Stiles v. Cardiff Steam Nav. Co.*, 33 L. J. [Q. B.] 310.

<sup>2</sup> In an action for biting a man, evidence of general ferocity in the dog's character was held sufficient (*McCaskill v. Elliott*, 5 Strobh. 196).

<sup>3</sup> In an action for damage done to a horse by a bull, evidence of a previous attack by the bull upon a man was held competent, but not conclusive evidence. The court below having held it *conclusive*, the judgment was reversed (*Cockerham v. Nixon*, 11 Ired. [N. C.] Law, 269).

<sup>4</sup> In *Mason v. Keeling* (12 Modern, 332), Gould, J., intimated that knowledge of a dog's propensity to bite cows would not make the owner liable for his biting sheep.

upon his owner the burden of clearly proving that the dog was *not* in the habit of biting such animals. Knowledge that a bull is in the habit of running at anything red, is sufficient to make it negligent to drive him through public streets, at any rate so far as to make the owner liable to a person injured by the bull in pursuit of some red object.<sup>1</sup>

§ 191. The nature of the evidence to be adduced in proof of an animal's vicious inclinations, and of the owner's notice, must of course vary greatly, according to circumstances. In an action against the owner of a dog which has attacked the plaintiff's person, it has been held that proof of one or two previous instances<sup>2</sup> of the kind, or even of mere attempts to bite,<sup>3</sup> brought to the notice of the defendant,<sup>4</sup> will suffice; and even that the fact of the dog's being kept chained during the daytime is strong evidence that his owner knew him to be dan-

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But such evidence has been held competent in later times (*Pickering v. Crange*, 1 Scamm. 338, 492).

<sup>1</sup> *Hudson v. Roberts*, 6 Exch. 697.

<sup>2</sup> A *subsequent* instance is of course immaterial (*Thomas v. Morgan*, 2 Cr. M. & R. 496).

<sup>3</sup> *Worth v. Gilling*, Law Rep. 2 C. P. 1.

<sup>4</sup> In *Buckley v. Leonard* (4 Denio, 500), two instances were held sufficient, taken in connection with other circumstances. In *Smith v. Pelah* (2 Strange, 1264), one was held enough; Lee, C. J., saying: "If a dog has once bit a man, and the owner having notice thereof, keeps the dog, and lets him go about or lie at his door, an action will lie against him at the suit of a person who is bit, though it happened by such person's treading on the dog's toes; for it was owing to his not hanging the dog on the first notice. And the safety of the king's subjects ought not afterward to be endangered." In *Arnold v. Norton* (25 Conn. 92), the judge at the trial charged that full and satisfactory proof of a single instance in which the dog had previously bitten a human being, and of the defendant's knowledge thereof, was sufficient, but that the force of such testimony would depend much upon the surrounding circumstances. On exceptions by the defendant, this was held to be a proper instruction. In *Kit-tredge v. Elliott* (16 N. H. 77), evidence of notice of one attack by a dog was held sufficient to charge the owner for all its subsequent acts. See also *Woolf v. Chalker* (31 Conn. 121). In *Loomis v. Terry* (17 Wend. 496), one instance seems to have been regarded as sufficient; though that point is not discussed in the opinion of the court. In *Cockerham v. Nixon* (11 Ired. [N. C.] Law, 269), one attempt of a bull to gore was held sufficient for this purpose.



gerous;<sup>1</sup> though it would, of course, make a difference if it appeared that the dog was so kept merely to keep him from straying or being stolen. But mere snappishness in a small dog ought not to be held sufficient warning to the owner of its liability to inflict injuries rarely committed by dogs of its size; and where evidence of mere *attempts* to bite is relied upon, it must appear that on such occasions the dog had really tried to injure the persons assaulted.<sup>2</sup> If the defendant's admission that he knew the nature of the animal is relied upon, it must appear that such admission referred to a time prior to the injury complained of; and if this is left in doubt by the plaintiff's own evidence, the question cannot be submitted to the jury.<sup>3</sup> In an action upon injuries committed by one dog upon another, fuller evidence should be required, since some allowance must be made for the nature of the animal, and for the difficulty of knowing which is the real aggressor in a dog-fight; but a few instances of apparently unprovoked violence on the part of the defendant's dog are sufficient proof of his viciousness.<sup>4</sup> And there are cases in which, although the animal never actually committed an injury, so far as its owner knew, yet its nature

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<sup>1</sup> See *Buckley v. Leonard* (4 Denio, 500), where this kind of evidence, though cumulative, was regarded as sufficient in itself. There it appeared that the dog was usually kept chained by day, and put in the defendant's store at night, and the court deemed this "strong evidence." In *Jones v. Perry* (2 Esp. 482), Lord Kenyon attached much weight to similar facts; while in *Beck v. Dyson* (4 Campb. 198), Lord Ellenborough held such evidence insufficient. The form of the pleadings in the latter case does not appear; but it seems probable that the declaration alleged former attempts to bite, and not merely general fierceness. Under such a declaration, the evidence would not have been admissible.

<sup>2</sup> *Line v. Taylor*, 3 Fost. & F. 731. Erle, C. J., there charged the jury: "It is not necessary to show that he [the dog] was used to *bite*, if he was used to *injure* people. But if he merely had a habit of bounding upon people in play, even although in so doing he might frighten timid persons, or cause some little annoyance, that would not sustain the action." The defendant had a verdict.

<sup>3</sup> *Cooke v. Warin*, 2 Hurlst. & C. 332.

<sup>4</sup> In *Wheeler v. Brant* (23 Barb. 324), four such instances were held enough for this purpose.

and appearance must have convinced the owner that it would certainly be disposed to do harm. Proof of this kind would be as cogent as evidence of particular acts of the animal.

§ 192. The owner of an animal is not excused from liability for its acts by the fact that it was generally reputed to be of an inoffensive disposition,<sup>1</sup> nor even by its being in fact generally peaceable and inoffensive, if it nevertheless was accustomed, even on rare occasions, to do mischief of such kind as to manifest its disposition to commit the injuries complained of.

§ 193. It is not in itself an act of culpable negligence to keep animals having an infectious disease. The owner cannot be held responsible for the communication of the disease to other animals, without proof of some fault on his part, other than the mere keeping such animals on his premises; nor does the fact that his neighbor keeps, to his knowledge, healthy animals upon the adjoining lot, alter the case.<sup>2</sup> And even the keeping of diseased animals on the defendant's uninclosed ground, to which other animals are in the habit of coming, and where it is no trespass for them to come, is not an act of negligence, if the owner of

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<sup>1</sup> *Buckley v. Leonard*, 4 Denio, 500. In that case, the defendant was sued upon an injury received from the bite of his dog. After proof of two other occasions on which the dog had bitten human beings, and notice of the facts to the defendant, evidence was offered by him, and received under objection, that in the opinion of witnesses acquainted with the dog, he was of a quiet and inoffensive disposition. Held error, and the judgment reversed; *Jewett, J.*, saying: "The evidence given by the defendant of the mild character and deportment of the dog, I think was improperly admitted. It was immaterial. If the evidence proved that the dog bit the plaintiff, that the defendant was the owner, and knew or had notice that the dog had been accustomed to bite others, he was responsible for the injury, however high the character of the dog for mildness stood among the neighbors. Such evidence was well calculated to divert the jury from a proper consideration of the real point in issue."

<sup>2</sup> *Fisher v. Clark*, 41 Barb, 329; see *Mills v. N. Y. & Harlem R. Co.*, 2 Robertson, 326.

the healthy animals is duly warned of the danger.<sup>1</sup> By a statute of Vermont,<sup>2</sup> the owner of sheep infected with hoof-ail, foot-rot, or scab, must keep them inclosed, and is liable for all damage caused to any person by their running at large.

§ 194. In Massachusetts and Pennsylvania, the owner of a horse, bull, &c., straying without a keeper on the highway, is liable for injuries committed by it, if of a kind which might be expected from such an animal when misbehaving, without reference to his knowledge of its habits, or to its natural viciousness.<sup>3</sup> But in Vermont, where the subject of fences is regulated by statutes, which do not require any more from the owner of animals than that he should restrain them from trespassing upon private property, it is held otherwise;<sup>4</sup> and so it is in England, though for a different reason, namely, that no

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<sup>1</sup> Walker v. Herron, 22 Tex. 55. By the law of that state, all uninclosed lands are common to the public.

<sup>2</sup> Verm. Gen. Stat. (1863), ch. 104, § 7. This section reads as follows: "Whenever any sheep belonging to or in the care of any person in this state shall be infected with the disease commonly called the 'hoof-ail' or 'foot-rot,' or with the 'scab,' it shall be the duty of such owner or keeper to restrain such flocks of sheep so diseased from running at large in the public highways or commons in this state, and keep them within their own proper inclosure; and if any sheep, diseased as aforesaid, the owner or keeper of the same knowing them to be so diseased, shall, with the knowledge or permission of such owner or keeper, be found running at large upon any common or public highway within this state, or if such sheep, while so diseased, shall be found within the inclosure of any person other than such owner or keeper—in any such case the owner or keeper of such diseased sheep, whose duty it shall be to restrain or take care of the same, shall forfeit and pay to the treasurer of the town wherein such offense against this statute shall be committed, the sum of ten dollars, to be recovered by an action of debt on this section, in the name of such town; and such owner or keeper shall be further liable in an action on the case, founded upon this section, for all damages which may accrue or happen to any other person in consequence of such diseased sheep being found off the inclosure of such owner or keeper as aforesaid."

<sup>3</sup> Goodman v. Gay, 15 Penn. St. 188; Barnes v. Chapin, 4 Allen, 444. Thus, the owner of a horse which, turned loose upon the highway, kicked a colt lawfully there, was held liable for the injury (Barnes v. Chapin, *supra*), and so where it kicked a child (Goodman v. Gay, *supra*).

<sup>4</sup> Holden v. Shattuck, 34 Verm. 336.

one but the owner of the fee in the highway, or the public, can complain of the presence of the animal.<sup>1</sup> A statute of Vermont makes the owner of a ram unconditionally liable for all damage caused by its going at large between August 1 and December 1;<sup>2</sup> and under this statute, the fact that the animal was fenced in is no defense.<sup>3</sup> The owner is nowhere held liable for injuries inflicted by a domestic animal, such as a horse, while running away from him upon the highway, if the animal was traveling under his charge, in a proper manner, and he used ordinary care to prevent such escape.<sup>4</sup> But if an animal of ever so peaceful a disposition is left by the owner upon the highway unattended and unfastened, he is liable for injuries committed by it in running away, or otherwise acting according to its well-known nature, even though provoked thereto by a stranger.<sup>5</sup> So long, however, as it does not run away, the question of negligence in leaving it unattended is for the jury, who may consider the temper, habits, and training of the animal. This is especially the case where the circumstance is relied upon merely in support of a defense of contributory negligence.<sup>6</sup>

§ 194 *a*. Wherever the law requires the owner of ani-

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<sup>1</sup> Cox v. Burbidge, 13 C. B. [N. S.] 430; see Jackson v. Smithson, 15 Mees. & W. 563.

<sup>2</sup> Verm. Gen. Stat. (1863), ch. 104. "All rams shall be restrained from going at large within this state, from the first day of August to the first day of December in each year" (§ 1). "The owner or keeper of a ram shall be liable for all damages sustained by any person in consequence of such ram going at large as aforesaid between the first day of August and the first day of December in any year" (§ 5).

<sup>3</sup> Town v. Lamphire, 37 Verm. 52.

<sup>4</sup> Sullivan v. Scripture, 3 Allen, 564; Goodman v. Taylor, 5 Carr. & P. 410; see Goodman v. Gay, 15 Penn. St. 188, 194; Weldon v. New York & Harlem R. Co., 5 Bosw. 576. In California, it is held that persons driving cattle through the streets of a city are liable for any injury resulting from the want of the *utmost* care (Ficken v. Jones, 28 Cal. 618).

<sup>5</sup> Illidge v. Goodwin, 5 Carr. & P. 190; see McCahill v. Kipp, 2 E. D. Smith, 413.

<sup>6</sup> Park v. O'Brien, 23 Conn. 339; see Walton v. London, Brighton, &c. R. Co., 1 Harr. & R. 424; 14 Weekly Rep. 395.

mals to keep them upon his own premises, it follows as a matter of course that if he suffers them to stray upon a railroad, he is liable for any injury which they may do to the property of the railroad company while so straying. But even where cattle are allowed by law to stray at large, their owner is bound to use ordinary care and diligence for the purpose of preventing them from straying upon land properly inclosed; and if he allows them to wander unattended upon a railroad that is sufficiently fenced, he is liable for the damage done to a train which is thrown off the track by running over them,<sup>1</sup> unless the railroad company is guilty of contributory fault. And wherever railroad companies are required by law to maintain fences for the exclusion of cattle, the want of such fences is contributory fault upon their part.

§ 195. Though we have, in conformity to the language used in the decisions, and for the sake of simplicity, spoken throughout of the "owner" as the person responsible for the acts of an animal, it should be understood that we do not mean by this to imply that in all cases the legal proprietor of an animal is the person, or the only person, thus to be held responsible. The owner of an animal, within the meaning of the rule, is the person who has the control of it, or whose duty it is to have such control. Presumptively, of course, the lawful owner has this control, or duty of control; but if it appears that he has not in fact, he is not responsible for the animal. Thus, if a horse of vicious habits should be stolen, or even wrongfully taken under a claim of title, the person thus taking it, and not the real owner, would be liable to third persons as its owner while it remained in his possession. So, if an animal is hired out, and even, we think, if it is

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<sup>1</sup> *Sinram v. Pittsburgh, Ft. Wayne &c. R. Co.*, 28 Ind. 244; *Hannibal & St. Jo. R. Co. v. Kenney*, 41 Mo. 271.

simply lent, for such a time and in such a manner as to give the hirer or borrower exclusive control over it, he, and not the ultimate owner, is liable in like manner. Of course a mere servant is not liable for the acts of his master's animals. But with these exceptions, it appears to be the settled rule that a person injured by an animal may hold either the actual owner, or the person having it in charge, liable for the injury, if it is one for which he ought to recover at all.<sup>1</sup> Therefore, one who harbors a dangerous animal on his premises, though not its owner in any sense, is nevertheless responsible for injuries committed by it while on or near his premises, to the same extent as if he owned it.<sup>2</sup> But one who has vainly tried to drive off a strange animal from his premises is not liable for its acts.<sup>3</sup>

§ 196. The ownership of an animal is sufficiently established by evidence that it was in the possession of the person sought to be charged with liability for its acts.<sup>4</sup> He may, of course, show upon his part that, notwithstanding such possession, he was not the actual owner of the animal; but the burden of proof in that respect is upon him; and in the absence of such proof, the fact of his possession is enough, not merely to authorize, but to require a jury to

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<sup>1</sup> *Wilkinson v. Parrott*, 32 Cal. 102. A father borrowed a dog from his son without (as he testified) any intention of returning him, having previously transferred the dog to his son upon a secret trust to defraud his creditors. Held, that the son was nevertheless liable for injuries done by the dog while at the father's house (*Marsh v. Jones*, 21 Verm. 378). A mere agistor of animals is liable for their trespasses (*Sheridan v. Bean*, 8 Metc. 284). In *Barnum v. Vandusen* (16 Conn. 200), it was held that one who has the care and custody of sheep, for the purpose of depasturing them, is liable for damage done by them, equally with the actual owner.

<sup>2</sup> *Frammel v. Little*, 16 Ind. 251; *McKone v. Wood*, 5 Carr. & P. 1.

<sup>3</sup> A strange dog hung about a railroad station, and attacked a lady. Complaint was made to the company's servants, who promised to drive it off, but could not find it. Afterward finding it in the signal box, the man kicked it out, and it ran off to the platform and bit a passenger. It was held that the company was not liable (*Smith v. Great Eastern R. Co.*, Law Rep. 2 C. P. 4).

<sup>4</sup> *Fish v. Skut*, 21 Barb. 333.

find that he was the owner.<sup>1</sup> Of course, it must be understood that in some cases the circumstances of possession, as proved by the plaintiff himself, will show that the defendant was not the owner. The evidence of possession to which we refer as implying ownership is such as shows either a mere naked possession, without anything to show that the defendant was not the owner, or a possession accompanied with circumstances further indicative of ownership.

§ 197. It is a nice question to determine how far the notice which the legal owner of an animal has of its habits is to be imputed to other persons having it in their charge, and standing in the position of the owner in respect to third persons. Against one who wrongfully takes an animal the case is clear. Having unlawfully assumed the position of an owner, under circumstances which, by his own fault, prevented him from knowing the nature of the animal, he should bear all the burdens, and be charged with all the knowledge or notice chargeable to the real owner. Guilty of more than negligence toward the lawful owner, he is as to third persons guilty of gross negligence in assuming the charge of an animal with the nature of which he is unacquainted. It is the duty of the owner to communicate his knowledge upon this point to any person hiring or borrowing the animal;<sup>2</sup> and the latter has, there-

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<sup>1</sup> *Fish v. Skut*, 21 Barb. 333.

<sup>2</sup> A lender is bound to inform the borrower of any defects in the thing lent, of which he is aware, and which render it dangerous to the borrower (*Story Bailm.* § 275; see *Blakemore v. Bristol &c. R. Co.*, 8 El. & Bl. 1035, 1051). The obligation of a mere lender goes no further than this. He cannot be made liable for not communicating anything which he did not *in fact* know, whether he *ought* to have known it or not (see *McCarthy v. Young*, 6 Hurlst. & N. 329). One who lets a chattel upon hire is under greater obligations in this respect than a mere lender. According to the civil law, he warrants the thing hired to be fit for the use contemplated by the parties (*Story Bailm.* §§ 383, 390, 391a; *Pothier de Louage*, n. 122). Certainly he warrants it against vices of which he *ought* to be aware; and these include all those for which the hirer of an animal could be made liable.

fore, a remedy over which affords some ground for holding him responsible for the possession of the information to which he has thus a right; while it would be difficult, if not impossible, to maintain that third persons could sue the owner for his omission of a duty which he owed to the hirer of the animal, and not to them. A distinction must, however, be made between the various classes of bailees. While all should be held liable to third persons, to the extent of the notice which they respectively have of the habits of animals under their control, for their negligence in controlling such animals; yet the extent to which notice will be implied, as well as the extent of control which the bailee may exercise, varies in different cases, and the obligations of the bailee vary accordingly. A borrower can at most be charged with notice of facts actually known to the lender, those being all that the latter is bound to communicate; while hirers, pawnees, or depositaries, being entitled to information of everything indicating vicious habits, of which the bailor had *notice*, may be held chargeable with the like notice, since they can recover against the bailor for his failure to communicate it to them.

§ 198. Where two or more animals belonging to different persons unite in committing an injury, the owners cannot at common law be made jointly liable for the acts of all the animals thus acting together;<sup>1</sup> but each owner is separately liable for so much only of the damage as was done by his animal.<sup>2</sup> It is true that it may often be impossible to tell precisely how much of the whole damage was done by each animal; but the jury are at liberty to

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<sup>1</sup> Van Steenburg v. Tobias, 17 Wend. 562; Russell v. Tomlinson, 2 Conn. 206; Adams v. Hall, 2 Verm. 9; Buddington v. Shearer, 20 Pick. 477; Denny v. Correll, 9 Ind. 72.

<sup>2</sup> Partenheimer v. Van Order, 20 Barb. 479; Auchmuty v. Ham, 1 Denio, 495; Van Steenburgh v. Tobias, 17 Wend. 562; Russell v. Tomlinson, 2 Conn. 206; Adams v. Hall, 2 Verm. 9.



adopt any reasonable method of assessing the damages for this purpose. Where the animals are about equal in capacity for mischief, the jury may properly assume, in the absence of proof, that each animal did an equal proportion of the damage;<sup>1</sup> and when they are not of equal size, the jury may assume that the smaller animal committed less injury than the other.<sup>2</sup> In Vermont,<sup>3</sup> Connecticut,<sup>4</sup> and Ohio,<sup>5</sup> by statute, the several owners of dogs which unite in doing injury are jointly liable therefor.

§ 199. Some nice questions as to what amounts to contributory fault on the part of the plaintiff arise in cases of injuries by animals.<sup>6</sup> The general principles which govern this subject have been stated in another part of this treatise;<sup>7</sup> but their application to this class of injuries, especially in relation to dogs, is not altogether

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<sup>1</sup> *Partenheimer v. Van Order*, 20 Barb. 479; *Buddington v. Shearer*, 20 Pick. 477.

<sup>2</sup> *Wilbur v. Hubbard*, 35 Barb. 303.

<sup>3</sup> By Gen. Stat. (1863), ch. 104, § 9, it is provided that "if any sheep or lambs shall be worried, wounded, or killed by any dog or dogs within this state, the owner or keeper of such dog or dogs, whether they have been accustomed to worry, wound, and kill sheep or lambs or not, shall pay to the owner or owners of such sheep double damages which he or they may have sustained or may be likely to sustain by reason thereof, to be recovered by an action of trespass founded on this section of the statute, together with double costs, before any court competent to try the same; and in case the injury complained of shall have been occasioned by two or more dogs, acting jointly and in concert, belonging to separate and different owners or keepers, the person or persons injured may by virtue of this statute have and maintain a joint action against the different owners or keepers of such dogs, and recover joint damages and costs against all."

<sup>4</sup> By Gen. Stat. (1866), p. 116, § 123, it is provided that "whenever any sheep or lambs shall have been damaged by two or more dogs at the same time, kept by two or more persons, the owners or keepers of such dogs shall be jointly and severally liable to the owner of such sheep and lambs for such damage; and if such owners reside in different towns, such towns shall be jointly and severally liable for said damage."

<sup>5</sup> Stat. 1866, p. 94.

<sup>6</sup> Where the plaintiff knew a horse to be vicious, but supposed it to be muzzled, as it usually was, it was held that the plaintiff was not in fault for passing so near the horse as to enable it to bite him (*Koney v. Ward*, 2 Daly, 295; 36 How. Pr. 255).

<sup>7</sup> See *ante*, §§ 25-52; *Cogswell v. Baldwin*, 15 Verm. 404.

easy. It is undoubtedly negligence to tread, even by accident, upon a dog's toes; but is a man's life to be forfeited by such an act? One who will wantonly irritate an animal may justly be left to bear his fate; but the owner of a ferocious dog ought surely not to be allowed to leave him with impunity in places exposed to the careless tread of passers by. And this appears to be the law.<sup>1</sup> It is not negligence to irritate an animal, when necessary to prevent it from doing mischief, and one who sustains an injury in so doing may nevertheless recover from its owner therefor.<sup>2</sup> A merely technical trespass by the plaintiff at the time is no defense to an action for an injury received from a vicious dog;<sup>3</sup> but where a dog is confined in a yard for the protection of the house, no one injured by it can recover damages, unless he had a right to be there.<sup>4</sup> It is not necessarily culpable negligence in a child to play with a strange dog, nor for the child's mother to suffer it to do so. The question is for the jury.<sup>5</sup> But it would be such negligence to suffer a child to approach a ferocious dog chained up in a retired place.<sup>6</sup> The fact that the plaintiff had been warned against going near a dog fastened up is

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<sup>1</sup> The owner of a dog is liable if, after he has had notice of its viciousness, it bites a person in consequence of being accidentally trodden upon, or because irritated by a child, or if it attacks or injures a trespasser (*Woolf v. Chalker*, 31 Conn. 121; and see *Smith v. Pelah*, 2 Strange, 1264).

<sup>2</sup> *Blackman v. Simmons*, 3 Carr. & P. 138. In that case, the defendant's bull pursued the plaintiff's cow, and the plaintiff drove it off; whereupon the bull turned upon him. Held, that the plaintiff was not in fault.

<sup>3</sup> *Loomis v. Terry*, 17 Wend. 496; *Sherfey v. Bartley*, 4 Sneed, 5.

<sup>4</sup> *Sarch v. Blackburn*, 4 Carr. & P. 297; *Moo. & M.* 505. This is especially the case at night, for it is then peculiarly proper to turn a dog loose for the protection of the house (*Brock v. Copeland*, 1 Esp. 203).

<sup>5</sup> *Munn v. Reed*, 4 Allen, 431. The child in that case was four years old, and irritated the dog while playing with it in the presence of his mother. It was held that he could recover for the bite of the dog, the question of contributory negligence having been left to the jury; and he had a verdict.

<sup>6</sup> See *Logue v. Link*, 4 E. D. Smith, 63.

not conclusive evidence of negligence on the part of the plaintiff, though he did go near him.<sup>1</sup> When a horse is left unattended in a public road, the jury should consider whether that circumstance contributed to an injury suffered by it at that time, whether by collision or otherwise.<sup>2</sup>

§ 200. The owner or occupant of land has a right to drive off animals trespassing upon it, and to use any ordinary and reasonable means for this purpose. He may drive such animals into the highway, and leave them to their fate, for which he is not responsible;<sup>3</sup> but if he drives them any further along the highway than is necessary to keep them off his land, he is liable for any injury thereby caused to their owner, such as their loss by straying.<sup>4</sup> The occupant has a right to drive off, in a similar manner, animals which are not trespassers, as where they come on his land through defect of fences which it was his duty to maintain;<sup>5</sup> but in such case, if the animals are owned by an adjoining proprietor, to whom he owes this duty, he must drive them upon their owner's premises, and not upon the highway, under pain of liability for their loss.<sup>6</sup> The occupant of land may set a dog to drive off trespassing cattle,<sup>7</sup> if it is one of

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<sup>1</sup> *Curtis v. Mills*, 5 Carr. & P. 489. There the defendant led the way past his dog; and the plaintiff, following in his steps, was seized by it.

<sup>2</sup> *Walton v. London, Brighton &c. R. Co.*, 1 Harr. & R. 424; 14 Weekly Rep. 395; *Park v. O'Brien*, 23 Conn. 339.

<sup>3</sup> *Humphrey v. Douglass*, 10 Verm. 71; see *Knour v. Wagoner*, 16 Ind. 414.

<sup>4</sup> *Knour v. Wagoner*, 16 Ind. 414.

<sup>5</sup> *Clark v. Adams*, 18 Verm. 425; see *Knour v. Wagoner*, 16 Ind. 414; *Lord v. Wormwood*, 29 Maine, 282; compare *Perkins v. Perkins*, 44 Barb. 134. If horses escape from the inclosures of the owner, through the insufficiency of a division fence, which it was the duty of the horses' owner in common with another to maintain, such other person may lawfully turn them from his inclosure into the highway (*Humphrey v. Douglass*, 11 Verm. 22).

<sup>6</sup> *Knour v. Wagoner*, 16 Ind. 414.

<sup>7</sup> *Davis v. Campbell*, 23 Verm. 236; *Clark v. Adams*, 18 Id. 425; *Wood v. La Rue*, 9 Mich. 158.

a kind that is not likely to wound or otherwise injure them without necessity.<sup>1</sup> But in so doing he must use ordinary care, restraining his dog from excessive worrying and positive violence.<sup>2</sup> If he uses his best efforts for this purpose, and the dog is not one which he has reason to believe to be needlessly fierce, he is not liable to an action for some excess of zeal on the part of the dog.<sup>3</sup>

§ 201. One who impounds animals straying upon his land is bound to put them in a pound fit at that time for the purpose, and cannot relieve himself from liability for injuries suffered by cattle, from the unfitness of the pound, by showing that it was *generally* in good condition,<sup>4</sup> or that he did not know of its bad condition,<sup>5</sup> or that it was the only pound provided by the town or parish,<sup>6</sup> for if that is in bad condition he may put the cattle elsewhere; and he is bound to provide them with sufficient food and drink,<sup>7</sup> but he is not liable for injuries received by the cattle from other animals in the pound.<sup>8</sup>

§ 202. In consequence of the prevalent disposition of dogs to worry strange sheep, and the great difficulty of

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<sup>1</sup> See *Clark v. Adams*, 18 Verm. 425; *Wood v. La Rue*, 9 Mich. 158. One who chases an animal, such as a horse, out of his field, with a very large and fierce dog, is liable for injuries thus inflicted (*Amick v. O'Hara*, 6 Blackf. 258).

<sup>2</sup> See same cases.

<sup>3</sup> Thus, where a man chased strange sheep off his land by the help of his dog, doing all in his power to call back the dog as soon as the sheep were off his ground, he was held not liable to an action, although his dog actually chased the sheep for some distance further: the court saying that the nature of a dog was such that he could not instantly be recalled (*Mitten v. Fourtrye*, Popham, 161; S. C., *sub nom.* *Millen v. Fawtreay*, W. Jones, 131).

<sup>4</sup> *Wilder v. Speer*, 8 Ad. & El. 547; approved in *Bignell v. Clarke*, 5 Hurlst. & N. 485.

<sup>5</sup> *Bignell v. Clarke*, 5 Hurlst. & N. 485.

<sup>6</sup> *Bignell v. Clarke*, *supra*; *Wilder v. Speer*, *supra*.

<sup>7</sup> *Adams v. Adams*, 13 Pick. 384.

<sup>8</sup> *Brightman v. Grinnell*, 9 Pick. 14.

proving the habits of particular dogs, the legislatures of many of the states have established an exception to the general rule upon this subject, and have made every owner of a dog liable for the killing or wounding of a sheep or lamb by such dog, without regard to the owner's knowledge or want of knowledge concerning the habits of the dog. The New York statute<sup>1</sup> refers in terms only to the *killing* and *wounding* of sheep, and is therefore construed so as not to extend to the case of a dog who merely chases or worries sheep. To recover for damage of that kind, proof is necessary of notice to the owner of the dog's habit in that respect.<sup>2</sup> So that if a dog chases a flock of sheep, killing some, wounding some, and merely worrying others without penetrating their skin, the owner of the sheep can recover from the owner of the dog the value of the sheep killed and wounded, without proving that the dog was ferocious; while he cannot recover for the sheep otherwise injured, without proof that the dog was ferocious, and that the owner had notice thereof.<sup>3</sup> The owner of wounded sheep can recover their full value under this statute, even though they do not die from the injuries.<sup>4</sup> In Vermont, Delaware, California, and Wisconsin,<sup>5</sup> simi-

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<sup>1</sup> The New York statute is as follows: "The owner or possessor of any dog that shall kill or wound any sheep or lamb shall be liable for the value of such sheep or lamb to the owner thereof, without proving notice to the owner or possessor of such dog, or knowledge by him that his dog was mischievous or disposed to kill sheep" (1 N. Y. Rev. Stat. 704, § 9).

<sup>2</sup> *Auchmuty v. Ham*, 1 Denio, 495; *Osincup v. Nichols*, 49 Barb. 145; compare *Job v. Harlan*, 13 Ohio St. 485.

<sup>3</sup> *Ib.*

<sup>4</sup> *Osincup v. Nichols*, 49 Barb. 145.

<sup>5</sup> "If any sheep or lambs shall be worried, wounded, or killed by any dog or dogs within this state, the owner or keeper of such dog or dogs, whether they have been accustomed to worry, wound, and kill sheep and lambs or not, shall pay to the owner or owners of such sheep double damages which he or they may have sustained or may be likely to sustain by reason thereof, to be recovered by an action of trespass founded on this section of the statute, together with double costs, before any court competent to try the same; and in case the injury complained of shall have been occasioned by

lar statutes have been enacted, extending however to dogs *worrying* as well as wounding sheep, and, in Vermont, subjecting the owner or keeper to double damages. On the other hand, the law of Maryland exempts the owner of a dog from all liability for sheep killed by it, if he kills the dog immediately upon receiving notice of the injury; while if he refuses to do so, he is liable in double damages.<sup>1</sup>

§ 203. In Illinois a statute has been passed, declaring in general terms that the owner of a dog shall be liable for all damage done by such dog to any domestic animals.<sup>2</sup>

two or more dogs acting jointly and in concert, belonging to separate and different owners or keepers, the person or persons injured may, by virtue of this statute, have and maintain a joint action against the different owners or keepers of such dogs, and recover joint damages and costs against all" (Verm. Gen. Stat. [1863], ch. 104, § 9). Chasing sheep is "worrying" them (*Campbell v. Brown*, 1 Grant [Pa.] 82).

"The owner or possessor of a dog which shall kill, wound or worry a sheep or lamb shall be liable to pay the owner of such sheep or lamb the full value thereof; and it shall be lawful for any person to kill such dog" (Del. Rev. Code [1852], ch. 51, § 10).

"The owner or owners of any dog or dogs which shall worry, wound, or kill any sheep, Cashmere or Angora goats, shall be liable to the owner or possessor of such sheep, goat, or goats, for the damages and costs of suit, to be recovered before any court having jurisdiction in the case" (Cal. Rev. Stat. [1866], ch. 227, § 4).

"The owner or keeper of any dog which shall have killed, wounded, or worried any sheep or lambs shall be liable to the owner or legal possessor of (*such*) sheep or lambs for all damage so done by such dog, without previous notice to the owner or keeper of such dog, or knowledge by him, that his dog was mischievous or disposed to kill or worry sheep" (Wisc. Rev. Stat. [1858], ch. 48, § 3, p. 387).

<sup>1</sup> "If any dog shall be detected in killing or injuring sheep, and proof thereof shall be made by the oath of the owner of said sheep, or any other person, being a competent witness, before a justice of the peace, the owner of said dog, upon complaint to him made, and information of such proof, shall proceed forthwith to kill said dog, and on his refusal or neglect to do so, the owner of said sheep may kill such dog afterward running at large, or may apply to a constable, who, upon the production of the aforesaid affidavit, shall proceed to the house of the owner of said dog, and kill said dog there or wherever else found. If such dog shall immediately upon such complaint and information be killed by his owner, the owner of the sheep shall not have cause of action against the owner of said dog; but upon his refusal to kill said dog, the owner of said sheep may recover double the value of the sheep killed, with costs, in the manner prescribed for the recovery of debts" (Maryland Code [1860], 595, §§ 1, 2).

<sup>2</sup> "The owner of any dog or dogs shall be liable in an action on the case for all damages that may accrue to any person or persons in this state, by reason of such

Other states have made the owners of dogs liable for all injuries inflicted by their dogs. Such is the law of Ohio,<sup>1</sup> Connecticut,<sup>2</sup> and Pennsylvania;<sup>3</sup> while in Maine<sup>4</sup> and Massachusetts<sup>5</sup> the owners are liable in the same cases for double damages. The benefit of these statutes is not confined exclusively to the person *directly* injured. The parent or master of a child bitten by a dog may recover double damages.<sup>6</sup> Under the Massachusetts statute it is held that the owner of a dog is liable for its acts, without proof of his knowledge of its habits.<sup>7</sup> We should suppose that such was the intent of the legislatures in all these statutes, since otherwise the statutes giving single damages only

dog or dogs killing, wounding, or chasing any sheep or other domestic animal belonging to such other person or persons; and when the amount of such damage does not exceed one hundred dollars, the same may be recovered by an action before a justice of the peace" (1 Ill. Gen. Stat. [1858], 99; Laws of 1853, 124).

<sup>1</sup> "Every person owning, harboring, or keeping any dog shall be liable to the party injured for all damages done by such dog; and it shall be lawful for any person to kill or cause to be killed any dog or dogs which he may find roaming at large on his premises without the presence of the owner or keeper of such dog; and it shall further be lawful for any person at any time to kill or cause to be killed any dog which may be or may have been found killing, worrying, or injuring any sheep or lambs" (1 Swan's Stat. [1860], 71, § 1).

<sup>2</sup> "Whenever any dog shall do any damage, either to the body or property of any person, the owner or keeper, or if the owner or keeper be a minor, then his parent or guardian, or if he be an apprentice, then his master, shall pay such damage, to be recovered in an action of trespass" (Conn. Gen. Stat. [1866], 117, § 127).

<sup>3</sup> "The owner or owners of any dog or dogs shall be liable for all damages done or caused to be done by any and every such dog or dogs, in an action of trespass *vi et armis*, in the name of the person or persons injured, to be sued for and recovered before any court or justice of the peace having jurisdiction of the amount so claimed" (Purdon's Digest, 350, § 2).

<sup>4</sup> "Towns may pass by-laws to regulate the going at large of dogs within them. When any dog does any damage to a person or his property, his owner or keeper, and also the parent, guardian, master, or mistress of any minor or servant, who owns or keeps such dog, shall forfeit to the injured person double the amount of the damage done, to be recovered by action of trespass" (Maine Rev. Stat. [1857], ch. 30, § 1).

<sup>5</sup> "Every owner or keeper of a dog shall forfeit to any person injured by it double the amount of the damage sustained by him, to be recovered in an action of tort" (Mass. Gen. Stat. [1860], ch. 88, § 59).

<sup>6</sup> McCarthy v. Guild, 12 Metc. 291.

<sup>7</sup> Pressey v. Wirth, 3 Allen, 191.

would be superfluous. But the only decision that we can find in Pennsylvania seems to imply the contrary;<sup>1</sup> and although that decision was rendered under a different statute, now repealed, it may be an authority in favor of construing the existing statute of that state as merely declaratory of the common law. In New Hampshire<sup>2</sup> and Massachusetts,<sup>3</sup> the owner of any domestic animal, and in Wisconsin,<sup>4</sup> the owner of any sheep or lamb, may recover from the town for an injury inflicted thereon by a dog. The owner of the injured animal may, if he chooses, sue the owner of the dog, instead of claiming his loss from the town; but if he elects to prove his damages to the supervisors of the town, and accepts an order on the town treasurer for the amount, his claim becomes by operation of law transferred to the town, and it may recover against the owner of the dog; while the owner of the sheep cannot thereafter recover against him.<sup>5</sup>

§ 204. In England and Wales, it is provided by statute<sup>6</sup> that the owner or harbinger of a dog shall be liable for all

<sup>1</sup> *Campbell v. Brown*, 19 Penn. St. 359.

<sup>2</sup> "Every person suffering loss or damage by reason of the worrying, maiming, or killing of his sheep, lambs, or other domestic animals by a dog, may, within thirty days after he knows of such loss or damage, present to the selectmen of the town wherein such loss or damage happens, proof of the nature and extent thereof, and they shall draw an order in favor of the person suffering such loss or damage, upon the treasurer of said town for the amount of the same" (N. H. Gen. Stat. [1867], ch. 105, § 11). "After such order has been drawn, the city or town may recover in an action of assumpsit against the keeper or owner of any dog concerned in doing the damage or occasioning the loss, the full amount of such order" (Id. § 13).

<sup>3</sup> The same provisions are contained in the General Statutes of Massachusetts (1860, ch. 88, § 64).

<sup>4</sup> "The owner of any sheep or lambs, suffering loss by reason of worrying, maiming, or killing thereof by dogs, may present within thirty days after such loss shall come to his knowledge, to the mayor or aldermen of the city, the president or trustees of an incorporated village, or supervisors of the town wherein the damage is done, proof thereof, and thereupon the said officers shall draw an order in favor of the owner of said sheep or lambs, upon the treasurer of said city, incorporated village, or town, for the amount of such loss" (Wisc. Stat. of 1860, ch. 175, § 5).

<sup>5</sup> *Denney v. Lenz*, 16 Wisc. 566.

<sup>6</sup> Stat. 23 & 29 Vict. c. lx. § 1.



injuries to cattle or sheep committed by it, without evidence of any mischievous propensity in the dog, or of any negligence on the part of the owner.

§ 205. Where one dog kills or injures another dog; the owner of the injured dog may recover damages from the owner of the other, in a proper case;<sup>1</sup> but in determining the question of liability, the nature of the species of animal must be taken into account. An action will not lie for every dog-fight.<sup>2</sup> It is the well-known nature of such animals, especially among the larger breeds, to fight upon slight provocation; and some allowance must be made for this. In order to recover in such a case, it has been held necessary to prove that the victorious dog was the aggressor, that his master had notice of his vicious disposition toward other dogs, that the injured dog did not provoke the assault, and that his master did not, by his want of ordinary care, expose him to the injury suffered.<sup>3</sup> The last point, however, is in our judgment matter of defense.

§ 206. As many of the injuries committed by dogs, and especially their depredations among sheep, are committed at night, it would be difficult to identify them in some cases, if very strict evidence should be required. A witness has, therefore, been allowed to identify a dog by his peculiar bark.<sup>4</sup>

§ 207. In New York, it is provided by statute that every person in possession of a dog, or who suffers a dog to remain about his house for the space of twenty days previous to any attack made by such dog upon sheep, is to be deemed the owner of such dog, so far as to make him liable for the killing or wounding of such sheep.<sup>5</sup>

<sup>1</sup> *Wheeler v. Brant*, 23 Barb. 324.

<sup>3</sup> *Wiley v. Slater*, 22 Barb. 506.

<sup>2</sup> *Wiley v. Slater*, 22 Barb. 506.

<sup>4</sup> *Wilber v. Hubbard*, 35 Barb. 303.

<sup>5</sup> "Every person in possession of any dog, or who shall suffer any dog to remain about his house for the space of twenty days previous to the assessment of a tax, or

And another section of the same statute<sup>1</sup> declares that "the owner *or* possessor of any dog that shall kill or wound any sheep or lamb shall be liable" for the act. It is, therefore, clear that in an action upon such injuries it would be enough to prove that the defendant possessed the dog, and that no evidence of the ownership being in another person would be of any avail.<sup>2</sup> This statute does not, according to our construction of it, extend to actions for damage done to sheep by mere worrying, but applies only to actions for the value of sheep killed or wounded.<sup>3</sup> The statute does not make any one liable for the acts of a dog brought to and kept about his premises by another person, and going away with that person, even though the dog should literally stay about the house for more than twenty days. The opposite interpretation would be unreasonable. Thus, the master of the house is not responsible for a dog brought daily to the house by a laborer to whom it belongs, and returning with him at night,<sup>4</sup> nor for a dog belonging to a guest, and remaining under his charge. The intention of the statute is plainly to give a remedy for the depredations of the numerous dogs which hang around houses, without any recognized master, tolerated rather than owned.

§ 208. In Maine<sup>5</sup> and Massachusetts,<sup>6</sup> the keeper of a dog is made by statute responsible for its wrongful acts

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previous to any injury, chasing, or worrying of sheep, or any such attack made by a dog, shall be deemed the owner of such dog for all the purposes of this title" (1 N. Y. Rev. Stat. 708, § 20).

<sup>1</sup> 1 N. Y. Rev. Stat. 704, § 9.

<sup>2</sup> See *Auchmuty v. Ham*, 1 Denio, 495, 500.

<sup>3</sup> See *Auchmuty v. Ham*, 1 Denio, 495. The statute applies to certain actions for penalties for keeping dogs, but these are not within the scope of our subject.

<sup>4</sup> *Auchmuty v. Ham*, 1 Denio, 495.

<sup>5</sup> Maine Rev. Stat. (1857), ch. 30, § 1.    <sup>6</sup> Mass. Gen. Stat. (1860), ch. 88, § 95.

in all cases. Under these statutes a corporation is liable, equally with a natural person, for a dog harbored by its servants upon its premises.<sup>1</sup> An English statute prescribes that any person with whom a dog lives or remains is to be deemed its owner, unless he proves that he is not, and that he did not know of or sanction the presence of the dog upon his premises.<sup>2</sup> The statute, however, relates to injuries done to sheep and cattle only, and therefore this rule only governs actions for such injuries.

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<sup>1</sup> *Barrett v. Malden &c. R. Co.*, 3 Allen, 101.    <sup>2</sup> Stat. 28 & 29 Vic. c. lx. § 2.

## CHAPTER XI.

### ATTORNEYS AND COUNSELLORS AT LAW.

- SEC. 209. Distinction between attorneys and barristers in Great Britain.
- 210. The distinction merely nominal in this country.
  - 211. Degree of skill, diligence, and prudence required of an attorney.
  - 212. General rule of liability.
  - 213. When liable for gross negligence only.
  - 214. Liability to summary jurisdiction of the court.
  - 215. Obligation not dependent upon compensation.
  - 216. Retainer implies professional employment merely.
  - 217. Advice of counsel, how far a protection to an attorney.
  - 218. The rule in this country.
  - 219. Negligence a question of fact for the jury.
  - 220. Burden of proof.
  - 221. Negligence in instituting proceedings.
  - 222. Negligence in preparation of pleadings.
  - 223. Obligation to proceed in the cause.
  - 224. Negligence in conduct of cause up to trial.
  - 225. Obligation to take collateral proceedings.
  - 226. Negligence in the conduct of the trial.
  - 227. Negligence in proceedings after trial.
  - 228. Extent of attorney's authority after judgment.
  - 229. Authority of attorney to settle claim before judgment.
  - 230. Authority to settle claim after judgment.
  - 231. Measure of damages, proof, &c.
  - 232. Negligence in matters not in litigation.
  - 233. Advice of counsel in case of doubtful title.
  - 234. Negligence in investing money on security.
  - 235. Liability for disclosing privileged communications.
  - 236. Joint liability of attorneys in copartnership.

§ 209. In England, the "bar" is made up of a class of men entirely distinct from attorneys, solicitors, and proctors; and the rules which govern the one class are entirely distinct from those to which the other is subject. As was the case among the Roman lawyers, so in Great Britain and in Europe generally, the profession of an advocate is deemed to be purely honorary. The advocate's fees do not depend upon, or grow due out of, any contract for labor or service, but are gifts,—not *merces*, but *honorarium*. Indeed, an advocate is incapable, in British law, of making a con-

tract for the compensation of his services as such.<sup>1</sup> While the law thus deprives a barrister of all power to enforce remuneration for his services, it affords him an immunity from all actions grounded on an imputation of want of skill, diligence, or discretion in the *bona fide* discharge of his duties.<sup>2</sup>

§ 210. In this country, at an early day, the English rule was adopted in Pennsylvania,<sup>3</sup> and is still maintained in New Jersey;<sup>4</sup> but the principle was afterward rejected in Pennsylvania;<sup>5</sup> and, so far as we are aware, New Jersey stands alone in her veneration for this tradition of the profession. In most of the other states, the right of a counsel, as such, to recover his fees, has been expressly adjudged.<sup>6</sup> In this country, therefore, it is well settled that

<sup>1</sup> *Kennedy v. Broun*, 13 C. B. [N. S.] 677. In this recent and most interesting case, Chief Justice Erle has exhausted the law on this subject. After stating the decisions, as well as the principles, governing the relation of an advocate and client, in an opinion inimitable for acuteness of reasoning and eloquence of statement, he concludes, that "on principle, as well as on authority, there is good reason for holding that the relation of advocate and client in litigation creates the incapacity to make a contract of hiring as an advocate."

<sup>2</sup> *Swinfen v. Lord Chelmsford*, 1 Fost. & F. 619; affirmed, 5 Hurlst. & N. 890; *Perring v. Rebutter*, 2 M. & Rob. 429; *Fell v. Brown*, Peake, N. P. 96; *Turner v. Phillips*, Id. 122.

<sup>3</sup> *Mooney v. Lloyd* (5 Serg. & R. 412), decided in 1819. This case overruled *Brackenridge v. McFarlane* (Add. 49), which was decided in the year 1793.

<sup>4</sup> *Seeley v. Crane*, 3 Green, 35, *Van Atta v. McKinney*, 1 Harr. 235. The federal courts also hold that counsel fees are not recoverable as such (*Law v. Ewell*, 2 Cranch C. C. 144).

<sup>5</sup> *Gray v. Brackenridge*, 2 Penn. 75; *Foster v. Jack*, 4 Watts, 334; *Balsbaugh v. Frazer*, 19 Penn. St. 95; *Lynch v. Commonwealth*, 16 Serg. & R. 368.

<sup>6</sup> So held in New York (*Stevens v. Adams*, 23 Wend. 57; 26 Id. 451; *Wilson v. Burr*, 25 Id. 386; *Wallis v. Loubat*, 2 Denio, 607; *Merrett v. Lambert*, 10 Paige, 352; *Lynch v. Willard*, 6 Johns. Ch. 342); in Massachusetts (*Brigham v. Foster*, 7 Allen, 419; *Ames v. Gilman*, 10 Metc. 239; *Thurston v. Percival*, 1 Pick. 415; see *Buckland v. Conway*, 16 Mass. 396); in Vermont (*Briggs v. Georgia*, 10 Verm. 68; *Vilas v. Downer*, 21 Verm. 419); in Pennsylvania (*Balsbaugh v. Frazer*, 19 Penn. St. 95; *Foster v. Jack*, 4 Watts, 334; *Gray v. Brackenridge*, 2 Penn. 75); in Delaware (*Stevens v. Monges*, 1 Harringt. 127); in South Carolina (*Duncan v. Breithaupt*, 1 McCord, 149; *Clendinen v. Black*, 2 Bailey, 488); in Ohio (*Christy v. Douglas*, *Wright*, 485); in Kentucky (*Rust v. Larue*, 4 Litt. 411, 417; *Caldwell v. Shepherd*, 6 Monr.

the relation of attorney and client may exist between counsel and one who engages his services in a professional capacity; and where that relation exists, he is responsible to his client, like an attorney, for negligence in the discharge of his duty. In speaking of attorneys, therefore, we mean *lawyers*—persons acting professionally in legal formalities, negotiations or proceedings, by the warrant or delegation of their client.<sup>1</sup>

§ 211. An attorney who undertakes to conduct legal proceedings professes himself to be reasonably well acquainted with the law and the rules and practice of the courts, and he is bound to exercise in the conduct of such proceedings a reasonable degree of prudence, diligence, and skill. He does not profess to know all the law, or to be incapable of misunderstanding or misapplying it to new and nice questions, for the most skillful counsel, and even judges, “may differ or doubt, and take time to consider.”<sup>2</sup> He does not undertake to exert the most consummate skill or the most tireless diligence in his client’s business. An unclouded judgment, a ready conception, a mastery of language—these are favors which nature unequally dis-

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389); in Tennessee (*Newman v. Washington*, Mart. & Yerg. 79); in Missouri (*Webb v. Browning*, 14 Mo. 354); in Texas (*Baird v. Ratcliff*, 10 Tex. 81); and in Florida (*Carter v. Bennett*, 6 Fla. 214).

<sup>1</sup> It seems that if a person, not legally authorized to practice law, is employed to conduct judicial proceedings, he is not legally responsible to his employer for any loss the latter may sustain in consequence of the ignorance of the person so employed in respect to legal proceedings (*Wakeman v. Hazleton*, 3 Barb. Ch. 148). But one who, though not in fact a licensed attorney, acted in that capacity to the plaintiffs, and was their legal and confidential adviser, is to be deemed, in principle, clearly within the rule applicable to attorneys, that the court will relieve clients against a fraud to which their attorney was a party, though both were implicated (*Freelove v. Cole*, 41 Barb. 318).

<sup>2</sup> *Pitt v. Yalden*, 4 Burr. 2060, per Lord Mansfield; see *Kemp v. Burt*, 4 Barn. & Ad. 424; *Bulmer v. Gilman*, 4 Man. & G. 108; *Donaldson v. Holdane*, 7 Clark & Fin. 762. In *Montrieu v. Jefferies* (2 Carr. & P. 113), the court charged the jury: “No attorney is bound to know all the law. God forbid that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law.” See *Bowman v. Tallman*, 2 Robertson, 385.

tributes. No man is at fault for not possessing them. What an attorney does profess and undertake, and all that he professes and undertakes, is, first, that he possesses the knowledge and skill common to members of his profession, and, second, that he will exercise, in his client's business, an ordinary and reasonable degree of attention, prudence, and skill.<sup>1</sup>

§ 212. While it is not difficult to deduce a general rule governing an attorney's liability for unskillfulness, if we consider alone the actual *decisions* of the courts, yet it will be found not a little difficult to reconcile with sound principle the language which the judges have employed in many of the reported cases. As juries are popularly supposed, in disputes between lawyers and their clients, to display a bias toward the latter, it may well be that judges have sometimes shown a corresponding liberality toward the former. Thus, it has been stated in cases of undoubted authority, that lawyers are liable to their clients only for gross negligence and utter incompetency.<sup>2</sup> It may very

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<sup>1</sup> In *Lamphier v. Phipps* (8 Carr. & P. 479), Tindal, C. J., in speaking of the degree of skill required of a surgeon, said: "An attorney does not undertake at all events you shall gain your cause, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable, and competent degree of skill." The same principle as to surgeons is enunciated in *Gallaher v. Thompson* (Wright [Ohio], 466), and *McCandless v. McWha* (22 Penn. St. 261). See the chapter on PHYSICIANS AND SURGEONS. "There is no implied agreement in the relation of counsel and client, or in the employment of the former by the latter, that the former will guaranty the success of his proceedings in a suit, or the soundness of his opinions, or that they will be ultimately sustained by a court of last resort. \* \* \* On the one hand, practitioners are bound to possess the skill and exercise the diligence and attention common to prudent members of the profession; and, on the other, they are released from all liability as to consequences which, considering the fallibility of human reason, must necessarily be sometimes unforeseen" (per Robertson, J., *Bowman v. Tallman*, 2 Robertson, 385; S. C., 27 How. Pr. 212). See *Weimer v. Sloane*, 6 McLean, 259; *Ex parte Giberson*, 4 Cranch C. C. 503; and cases cited *infra*.

<sup>2</sup> "An attorney is only liable for *crassa negligentia*" (per Lord Ellenborough, *Baikie v. Chandless*, 3 Campb. 17). In *Purves v. Landell* (12 Clark & Fin. 91), Lord Brougham said: "It is the very essence of this action that there should be a negli-

well be, and so it has undoubtedly been held, that to defeat an attorney's claim for compensation in a professional matter, such services must be shown to have been utterly

gence of the crass description, which we call *crassa negligentia*, that there should be gross ignorance, that the man who has undertaken the duty of an attorney, or of a surgeon, or of an apothecary, as the case may be, should have undertaken to discharge a duty professionally for which he was very ill qualified, or, if not ill qualified to discharge it, which he had so negligently discharged as to damnify his employer or deprive him of the benefit which he had a right to expect from the service." Even stronger language was used by Lord Campbell in the same case (page 102): "If an attorney acts honestly and to the best of his ability, he is not liable" (*Lynch v. Commonwealth*, 16 Serg. & R. 368; and see *Palmer v. Ashley*, 3 Pike, 75; *Gilbert v. Williams*, 8 Mass. 57). In *Wilson v. Russ* (20 Maine, 421), Emery, J., said: "The attorney is bound to execute business in his profession intrusted to his care with a reasonable degree of care, skill, and dispatch. If the client be injured by the gross fault, negligence, or ignorance of the attorney, the attorney is liable; but if he act with good faith, to the best of his skill, and with an ordinary degree of attention, he will not be responsible." In *Holmes v. Peck* (1 R. I. 245), Green, C. J., so far mistook the law as to say that "the want of ordinary care and skill, in such a person, is gross negligence." In the same paragraph he said: "We recognize the principle which subjects an attorney to liability for the want of *ordinary* skill and care in the management of business intrusted to him, as any one else who professes any other art or mystery." In *Pennington v. Yell*, 6 Eng. [Ark.] 212, Scott, J., although conceding that "reasonable diligence and skill constitute the measure of an attorney's engagement with his client," yet went on to say, "he is liable only for gross negligence or gross ignorance in the performance of his professional duties; and this is a question of fact to be determined by the jury, and is sometimes to be ascertained by the evidence of those who are conversant with and skilled in the same kind of business." The same idea is expressed by the court in *Evans v. Watrous* (2 Port. [Ala.] 205), but in a later well considered case in the same court, its fallacy was pointed out (*Goodman v. Walker*, 30 Ala. [N. S.] 482). In that case, Stone, J., said: "Some law-writers, and some adjudged cases, are guilty of inaccuracy in the employment of the phrase, 'gross negligence.' Our own court fell into this error, in the case of *Evans v. Watrous* (*supra*). It is there said, that an attorney is not liable, 'unless he has been guilty of gross negligence.' In the same paragraph it is asserted, that he 'is bound to use reasonable care and skill;' and the meaning attributed by the writer of that opinion to the expression 'gross negligence,' is want of '*reasonable* care and skill.' Thus explained, that opinion defines the true measure of an attorney's duty and liability. \* \* \* I lay down the rule then, for the determination of this case, as follows: If the law governing the bringing of this suit was well and clearly defined, both in the text-books and in our own decisions; and if the rule had existed, and been published, long enough to justify the belief that it was known to the profession, then a disregard of such rule by an attorney-at-law renders him accountable for the losses caused by such negligence or want of skill; negligence, if, knowing the rule, he disregarded it; want of skill, if he was ignorant of the rule." In *Cox v. Sullivan* (7 Geo. 144), Nisbet, J., said: "He is bound to the *highest honor and integrity*, to the *utmost* good faith. \* \* \* An attorney is not bound to extraordinary diligence. He is bound to *reasonable* skill and diligence, and the *skill* has reference to the char-



worthless,<sup>1</sup> but it does not follow that in an action against an attorney for damages resulting from his want of skill or diligence, gross negligence, and nothing short of it, must be shown. The true rule of liability undoubtedly is, that an attorney is liable for a want of such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise.<sup>2</sup> But unless the client is in

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acter of the business he undertakes to do. He is liable for ordinary neglect. In other words, 'he undertakes for the employment of a degree of skill ordinarily adequate and proportioned to the business he assumes.' *Spondet peritiam artis. Imperilia culpæ abnumeratur.* Reasonable skill constitutes the measure of his engagement, and he is responsible for ordinary neglect."

<sup>1</sup> The cases are by no means agreed on this point, and perhaps the weight of authority is now in favor of admitting any evidence of negligence, ignorance, or want of skill as a defense to an action for professional services, as well as for any other work and labor. (See 2 Greenl. on Ev. § 143, and cases there cited. And see, also, *Bowman v. Tallman*, 2 Robertson, 385; *Cousins v. Paddon*, 2 Crompt. M. & R. 547; *Randall v. Key*, 4 Dowl. P. C. 682; *Huntley v. Bulwer*, 6 Bing. N. C. 111; *Lewis v. Samuels*, 8 Q. B. 485; *Hopping v. Quin*, 12 Wend. 517; *Long v. Orsi*, 18 C. B. 610; *Hill v. Featherstonaugh*, 7 Bing. 569; *Hill v. Allen*, 2 Mees. & W. 284; *Symes v. Nipper*, 12 Ad. & El. 377, *n.*; *Bracey v. Carter*, Id. 373; *Wend v. Bond*, 21 Geo. 195). An attorney's right to compensation for services in one matter is not forfeited by his misconduct and breach of trust in another matter (*Currie v. Cowles*, 6 Bosw. 452).

<sup>2</sup> In *Godefroy v. Dalton* (6 Bing. 461), Tindal, C. J., said: "It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertakings and that *crassa negligentia*, or *lata culpa*, mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, appear to establish in general that he is liable for the consequences of ignorance or non-observance of the rules of practice of the courts, for want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses, or for the mismanagement of so much of the conduct of a cause as is usually allotted to his department of the profession. Whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law." In *Hart v. Frame* (6 Clark & Fin. 191, 210), in the House of Lords, the Lord Chancellor (Cottenham) said: "Professional men, possessed of a reasonable portion of information and skill, according to the duties they undertake to perform, and exercising what they so possess with reasonable care and diligence in the affairs of their employers, certainly ought not to be held liable for errors in judgment, whether in matters of law or discretion. Every case, therefore, ought to depend upon its own peculiar circumstances; and when an injury has been sustained which could not have arisen except from the want of such reasonable skill and diligence, or the absence of the employment of either on the part of the attorney, the law holds him liable. In undertaking the client's

some way injured by his attorney's negligence, he cannot maintain an action even for nominal damages.<sup>1</sup>

§ 213. Such is the general rule; but as each case is to be decided upon its own peculiar facts, it is not difficult to conceive a case where an attorney would be liable only for gross negligence. If he, at the outset, frankly acknowledges to his client his want of experience or skill in a particular department of business, or if the client becomes aware of it in some other way, and, notwithstanding, entrusts his business to the attorney, the client cannot complain of the latter's want of that which he knew never existed. It might, however, become a question in such a case, how far the attorney was bound to consult counsel, and whether a neglect to do so did not amount to a want of ordinary care and prudence.

§ 214. Besides the liability of attorneys to their clients for negligence in the conduct of professional business, they are, as officers of the courts to which they are admitted to practice, liable to the summary jurisdiction of the courts for any want of good faith and honesty in their relations with clients.<sup>2</sup> The question of negligence will

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business, he undertakes for the existence and for the due employment of those qualities, and receives the price of them." And see *Stephenson v. Rowland*, 2 Dow & Cl. 119. In *Bowman v. Tallman* (2 Robertson, 385), Robertson, C. J., said: "They are only chargeable with utter incompetency or want of ordinary care in a particular case." See *Russell v. Palmer*, 2 Wils. 235; *Pitt v. Yalden*, 4 Burr. 2061; *Jones v. Lewis*, 9 Dowl. P. C. 143; *Hayne v. Rhodes*, 8 Q. B. 342; *Stannard v. Ullithorne*, 10 Bing. 491.

<sup>1</sup> *Harter v. Morris*, 18 Ohio St. 492. See §§ 124, 231, *post*.

<sup>2</sup> In New York, any counsellor, attorney, or solicitor being guilty of, or consenting to, any deceit or collusion, with intent to deceive the court, is deemed to be guilty of a misdemeanor, and is subject to a forfeiture to the party injured in treble damages, to be recovered in a civil action (2 Rev. Stat. 287). And he may, being found notoriously in default of record, or guilty of any deceit, malpractice, or misdemeanor, be suspended or put out of the roll, at the discretion of the court; and if put off the roll, he can never afterwards be received to act as counsellor, &c. (1 Rev. L. of 1813, 417, § 5). Any counsellor, solicitor, or attorney may be removed or suspended who shall be guilty of any deceit, malpractice or misbehavior; but only on charges being

not in general be tried on motion, but only questions of good faith and integrity.<sup>1</sup> Proceeding on motion against an attorney for money collected is no bar to a recovery in an action on the case for his negligence in the suit.<sup>2</sup>

furnished him, and an opportunity given him to be heard in his defense (1 Rev. Stat. 109, § 24). An attorney delaying suit, or willfully receiving money on account of disbursements not made or incurred, forfeits treble damages (2 Rev. Stat. 287, § 69). Where a solicitor collects money for his client which he refuses to pay over, the court will enforce payment by a commitment for a contempt, and if he persists in his disobedience to the order of the court, he will be stricken from the roll (*Matter of Bleakley*, 5 Paige, 311; *People v. Smith*, 3 Caines, 221; *People v. Wilson*, 5 Johns. 368; see *Barry v. Whitney*, 3 Sandf. 696; *United States v. Porter*, 2 Cranch C. C. 60; *Ex parte Burr*, 2 Id. 379; 9 Wheat. 529). An attachment for not paying over money will not, however, be issued without a previous demand (*Ex parte Ferguson*, 6 Cow. 596; *Cottrell v. Finlayson*, 14 How. Pr. 242). The dishonesty which will warrant a court in striking an attorney's name from the roll must have been in his office of attorney. Thus, where an attorney drew a check upon a bank in which he had no money nor account, and delivered it in payment, held, that the act, though highly culpable, was not ground for striking him from the roll (*Bank of New York v. Stryker*, 1 Wheel. Cr. Cas. 330). Where an attorney also acted as a land agent, and received money in the latter capacity, the court refused to proceed against him in a summary way for neglecting to pay over the money (*Matter of Dakin*, 4 Hill, 42). But it is not necessary that the deceit should have been practiced in a suit actually pending. It is enough that it was done in his character of solicitor. Thus, where a solicitor forged the certificate of the deputy register to a paper purporting to be a copy of an order declaring a marriage void, for the purpose of enabling the husband to induce his wife to believe she had been legally divorced, held, it was a proper case to remove the solicitor from office (*Matter of Patterson*, 3 Paige, 510; and see *Rice v. Commonwealth*, 18 B. Monr. 472). And so where an attorney received money to invest on bond and mortgage, but did not do so, and it appeared that he would not have been employed had he not been an attorney, held, that he was liable to be summarily required on motion to repay it (*Grant's Case*, 8 Abb. Pr. 357; see also, *Ex parte Staats*, 4 Cow. 76). An attorney having brought suit without authority, and having failed, the court ordered him to pay the costs himself, and, in default of payment, to be suspended from practice until paid (*Anon.* 2 Cow. 589; compare *Balbi v. Duvet*, 3 Edw. 418; *Campbell v. Bristol*, 19 Wend. 101; *Blodget v. Conklin*, 9 How. Pr. 171). An attorney having filed a petition for divorce, which was unnecessarily gross and indelicate, and having deported himself improperly in reading it, the court taxed him with the costs of the cause. Held, that the court acted within its authority (*Brown v. Brown*, 4 Ind. 627; see *Judah v. Trustees of Vincennes University*, 23 Ind. 272; *Powell v. Kane*, 5 Paige, 265; affirming S. C., 2 Edw. 450; see also *Somers v. Torrey*, 5 Paige, 54; *Wolcott v. Hodge*, 15 Gray, 547).

<sup>1</sup> *Sharp v. Hawker*, 3 Bing. N. C. 66; *Brazier v. Bryant*, 2 Dowl. P. C. 600; *In re Jones*, 1 Chit. 651; *De Woolfe v. —*, 2 Chit. 68; *In re Fenton*, 3 Ad. & El. 404; *In re Aitkin*, 4 Barn. & Ald. 47.

<sup>2</sup> *Coopwood v. Baldwin*, 25 Miss. 129.

But proceeding by action for money collected is a waiver of the right to proceed by attachment.<sup>1</sup>

§ 215. The obligation of an attorney is to his client alone. Thus where, in answer to a casual inquiry by a stranger, he *bona fide* gives erroneous information as to the contents of a deed, he is not responsible to the inquirer.<sup>2</sup> To create the obligation, however, it is not necessary that there should be a compensation paid or to be paid. An attorney may be liable, although his services were rendered gratuitously.<sup>3</sup> But an attorney acting gratuitously is undoubtedly liable only for gross negligence. An attorney who takes legal proceedings in the name of another without authority is of course liable to such person,<sup>4</sup> or to any other person who is immediately prejudiced thereby.<sup>5</sup>

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<sup>1</sup> Cottrell v. Finlayson, 4 How. Pr. 242; see Bohanan v. Peterson, 9 Wend. 503.

<sup>2</sup> Fish v. Kelly, 17 C. B. [N. S.] 194. An attorney cannot serve professionally both parties to a controversy; and where he has been retained by one, he cannot recover for professional services rendered in the same matter to the other (Herrick v. Catley, 1 Daly, 512).

<sup>3</sup> Donaldson v. Holdane, 7 Clark & F. 762. As a matter of pleading, it is sufficient to state that the defendant was retained as attorney, without stating the consideration (Bourne v. Diggles, 2 Chit. 311; see Whitehead v. Greetham, 2 Bing. 464). An averment that the defendant undertook to prosecute a suit for a sum thereafter to be paid is sufficient (Eccles v. Stephenson, 3 Bibb, 517; and see Stephens v. White, 2 Wash. 203; Binghart v. Gardner, 3 Barb. 64). The plaintiff may frame his action in assumpsit or case for the breach of duty (2 Chit. Pl. 373; Church v. Mumford, 11 Johns. 479; Stimpson v. Sprague, 6 Maine, 470).

<sup>4</sup> Westaway v. Frost, 17 Law J. [Q. B.] 286; Bradt v. Walton, 8 Johns. 298. A recovery against an attorney for unreasonably defending an action wherein he appeared without authority, and unskillfully conducting the defense, was sustained in O'Hara v. Brophy (24 How. Pr. 379); and see Field v. Gibbs, Pet. C. C. 155; Munikuyson v. Dorset, 2 Harr. & Gill, 374; Cort v. Sheldon, 1 Tyler, 300; Ellsworth v. Campbell, 31 Barb. 134; Hubbard v. Phillips, 13 Mees. & W. 702; Hoskins v. Phillips, 16 Law J. [Q. B.] 333; Duper v. Keeling, 4 Carr. & P. 102.

<sup>5</sup> Andrews v. Hawley, 26 Law J. [Exch.] 323; see Cottrell v. Jones, 11 C. B. 713. It has been laid down as a general rule that a special authority must be shown to institute a suit, though a general authority is sufficient to defend one. Thus where one acting under a general retainer as solicitor undertook to defend an action brought against his client upon certain promissory notes, and filed an equity bill to restrain proceedings in that suit, the bill was ordered to be dismissed, with costs to be paid

§ 216. Under a general retainer, in the absence of a special agreement or employment, an attorney is not bound to take any steps in his client's business not implied by his profession. Under a general employment to collect a note placed in his hands before maturity, it has been held that an attorney is not bound to demand payment from the maker and give notice to the indorser, it not being an undertaking implied by his profession.<sup>1</sup> But an attorney who is retained to do a particular act, and is directed at the same time to do whatever is needful in the matter, is bound to take such steps as have immediate relation to the act for which he is specially retained.<sup>2</sup>

§ 217. In England, where the duty of advising on points of law is more particularly within the province of barristers, it has been held to be the duty of the attorney to submit to the opinion of counsel all mere questions of law,<sup>3</sup> the forms of pleadings,<sup>4</sup> the kind of evidence to be adduced, &c.; and where, without consulting counsel, an attorney undertakes to determine questions of law, and to act upon his own opinion, he will be answerable for the consequences of any error he may commit;<sup>5</sup> while the assistance of counsel will generally protect the attorney from liability. Where, therefore, an attorney for the plaintiff was advised by counsel that certain proofs were unnecessary, and in consequence of their non-production,

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by the solicitor, as having been filed without authority (*Wright v. Castle*, 3 Meriv. 12). On the retainer of a client since deceased, an attorney has no right to act for such client's personal representatives (*Wood v. Hopkins*, 2 Pennington, 689; *Campbell v. Kincaid*, 3 Monr. 566).

<sup>1</sup> *Odlin v. Stetson*, 17 Maine, 244.

<sup>2</sup> *Dawson v. Lawley*, 4 Esp. 65.

<sup>3</sup> *Godefroy v. Dalton*, 6 Bing. 460.

<sup>4</sup> See *Manning v. Wilkin*, 12 Law Times, 249.

<sup>5</sup> See *Hart v. Frame*, 6 Clark & F. 193; *Stevenson v. Rowland*, 2 Dow & C. 104,

the plaintiff was nonsuited, the attorney was held not liable.<sup>1</sup> But in matters peculiarly within the province of an attorney, and a knowledge of which the law will presume him to possess, the attorney cannot shift his responsibility by consulting counsel.<sup>2</sup>

§ 218. In general, in this country, an attorney is not relieved from responsibility by his own employment of other counsel,<sup>3</sup> though the employment of counsel, and the following of his advice, ought, we think, to have weight on the question of the exercise of a proper degree of prudence by the attorney. If counsel is employed by the client himself, or by the attorney with the knowledge and acquiescence of the client, it would seem reasonable that the advice of such counsel should be taken into consideration, at least on the question of damages.

§ 219. The question of negligence, whether it consists in improper conduct, or in a mistake as to the law, is one of fact for the jury to determine under proper directions by the court.<sup>4</sup> But in a case where the facts are undisputed,

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<sup>1</sup> *Godefroy v. Dalton*, 6 Bing. 460.

<sup>2</sup> *Godefroy v. Dalton*, 6 Bing. 460, 469; see *Goodman v. Walker*, 30 Ala. [N. S.] 482; *Smallwood v. Norton*, 20 Maine, 83.

<sup>3</sup> *Smallwood v. Norton*, 20 Maine, 33. An attorney cannot recover of his client fees of counsel associated with him without proving the client's request to employ counsel, or the payment by him of such fees with the client's sanction (*Cook v. Ritter*, 4 E. D. Smith, 253; *Matter of Bleakley*, 5 Paige, 311).

<sup>4</sup> *Reece v. Rigby*, 4 Barn. & Ald. 202; *Hogg v. Martine*, Riley, 156; *Parker v. Rolls*, 14 C. B. 691; *Pennington v. Yell*, 6 Eng. [Ark.] 212. In *Hunter v. Caldwell* (10 Q. B. 69, 82), Lord Denman said: "It was the province of the judge to inform the jury for what species or degree of negligence an attorney was properly answerable, and what duty in the case before them was cast upon him either by the statute or the practice of the courts; but, having done this, it was right to leave to them to say, considering all the circumstances, and the evidence of the practitioners, whether, in the first place, the attorney had performed his duty, and, in the second, in case of non-performance, whether the neglect was of that sort or degree which was venial and culpable in the sense of not sustaining or sustaining the action."

the court can determine as matter of law whether, in view of authorities attainable by proper research, any doubt in regard to the law is reasonable.<sup>1</sup>

§ 220. The burden of proving negligence is in general upon him who alleges it; but there are circumstances in which it may be shifted upon the opposite party. Thus, an attorney who is employed to defend a cause, and does nothing, is bound to justify his conduct by showing, if he can, that there was no defense to the action;<sup>2</sup> and if, in the conduct of a cause, diligence would have been ineffectual, it is for the defendant to show it.<sup>3</sup>

§ 221. The instances of actionable negligence on the part of attorneys which the cases contain are mostly those

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<sup>1</sup> *Bowman v. Tallman*, 2 Robertson, 385, per Robertson, J. It is proper for the court, where the question of negligence arose in the misconstruction of a statute, to express to the jury an opinion that the interpretation of the statute in question was doubtful (*Bulmer v. Gilman*, 4 Man. & G. 108, 123).

<sup>2</sup> *Godefroy v. Jay*, 7 Bing. 413; *Swannell v. Ellis*, 1 Id. 347.

<sup>3</sup> *Bourne v. Diggles*, 2 Chit. 311. Where an agreement sought to be enforced is made between principal and agent, or client and attorney, giving benefits and advantages to the agent and attorney, the right of action is not deemed to be established, or proof of the due execution of the instrument, without clear proof, outside the paper, of its integrity and entire fairness. The legal presumption is against its validity, and the burden is upon the agent and attorney of proving that all was fair, and that the client acted freely and understandingly. If it be claimed that the instrument was intended to provide a remuneration for past services, then the plaintiff must prove such services, that there existed at the time of giving it at least a moral obligation to pay, that the instrument was fully understood by the person executing it, and was made in pursuance of and in accordance with a well-considered, definite, and settled purpose (*Brock v. Barnes*, 40 Barb. 521; *Howell v. Ransom*, 11 Paige, 538). In *Jennings v. McConnel* (17 Ill. 148), an attorney became bail for his client. In contemplation of this, and to indemnify him as such, his client, for ostensible consideration of \$500, conveyed to him in fee land and effects worth at least \$1,000. The bail was forfeited. The attorney sold the land without the knowledge and consent of his client, who a few days afterward died intestate. The widow thereupon applied for an accounting for any surplus in the attorney's hands, estimating the land at its full value. *Scates, C. J.*, said: "It is not necessary that a client should establish fraud or imposition: the *onus* of proof, upon showing the relation when the contract or gift was made, is upon the attorney to show fairness, adequacy, and equity; and upon failure to make proof, courts of equity treat the case as one of constructive fraud. The highest degree of good faith and fairness is exacted."

relating to the institution of suits, their subsequent prosecution or defense to trial and judgment, and to settlement and compromise after judgment. In regard to the institution of legal proceedings, it has been held to be actionable negligence for an attorney to bring his action in a court which has no jurisdiction,<sup>1</sup> or to lay the venue in the wrong county,<sup>2</sup> or to proceed on the wrong section of a statute which gives the remedy;<sup>3</sup> but negligence cannot be imputed to an attorney simply because the statutory proceeding taken by him was in law ineffectual to accomplish the purpose for which he was retained, or was made so by the decision of the court.<sup>4</sup> It is negligence to prosecute too soon, as where an action was brought on a note on the last day of grace,<sup>5</sup> or before all the requisite notices and other preliminaries have been disposed of,<sup>6</sup> or before the facts have been sufficiently investigated to ascertain whether there is a right of action.<sup>7</sup> On the other hand, if the attorney delays to commence an action, and in the meantime the debtor becomes insolvent, and the debt is lost, he is liable to his client.<sup>8</sup> It seems that an attorney is bound to take

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<sup>1</sup> *Williams v. Gibbs*, 5 Ad. & El. 208.

<sup>2</sup> *Kemp v. Burt*, 4 Barn. & Ad. 424.

<sup>3</sup> *Hart v. Frame*, 6 Clark & F. 193. In that case, certain masters employed an attorney to take proceedings against their apprentices for misconduct, and the attorney specifically proceeded on the section of the statute which related to servants, and not to apprentices. It was held that this was an instance of such want of skill or diligence as to render the attorney liable to repay to his clients the damages and costs occasioned by his error. And the fact that the magistrate proceeded in the first instance to convict on the wrong section furnished no excuse to the attorney for founding his proceedings upon it.

<sup>4</sup> *Bowman v. Tallman*, 2 Robertson, 385.

<sup>5</sup> *Hopping v. Quin*, 12 Wend. 517.

<sup>6</sup> *Long v. Orsi*, 18 C. B. 619. In that case, the negligence consisted in not seeing that a foreign bill of exchange, on which the action was brought, was not duly indorsed (see *Hunter v. Caldwell*, 10 Q. B. 69).

<sup>7</sup> *Thwaites v. Mackenzie*, 3 Carr. & P. 341; *Gill v. Lougher*, 1 Cr. & J. 170; *Montgomery v. Devereaux*, 7 Clark & F. 188.

<sup>8</sup> *Smedes v. Elmendorf*, 3 Johns. 185. In that case, the defendant, an attorney



that course in the prosecution of a suit which will entail the least costs in case of defeat, and to that end to bring his suit, when possible, in an inferior, rather than a superior court, unless his client, with a knowledge of the consequences, instructs him otherwise; and in an action for unnecessarily and improperly suing in a superior court, the attorney's liability will depend upon whether, from his client's instructions, he might reasonably suppose that he would recover, and desired to sue for a sum which would carry costs, or that, from the circumstances and the nature of the question, a judge would certify for costs; and if he might reasonably so have supposed, he will not be liable, even though his client, failing to recover in the superior court, became subject to the costs of suit in that court.<sup>1</sup>

§ 222. An attorney is liable for omitting to insert in a writ necessary words, as where he counts for \$12 instead of \$1,200, whereby his client sustains a loss.<sup>2</sup> And he is liable for omitting to sue one of the parties to a note

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gave a receipt for a note, without expressing the purpose for which he received it. It was held that the presumption was that he received it to be collected, and that this presumption, confirmed also by other circumstances, was sufficient evidence to support an action against him by the payee of the note, for his neglect to sue the maker, who afterward became insolvent. In *Brougher v. Scobey* (23 Ind. 583), it was held that an attorney can only be held liable for the value of notes placed in his hands for collection, upon an averment of negligence in the collection of the notes, whereby the owners thereof have been placed in a condition rendering it more difficult to secure their money. Such relief is never granted upon a simple failure to account on demand. See *Wilson v. Coffin*, 2 Cush. 316; *Varnum v. Martin*, 15 Pick. 440; *Dearborn v. Dearborn*, 15 Mass. 315; *Pickets v. Pearsons*, 17 Verm. 470; *Suydam v. Vance*, 2 McLean, 99; *Braine v. Spaulding*, 52 Penn. St. 247; *Wakeman v. Gowdy*, 10 Bosw. 208.

<sup>1</sup> *Lee v. Dixon*, 3 Fost. & F. 744.

<sup>2</sup> *Varnum v. Martin*, 15 Pick. 440. "It may not be the strict professional duty of an attorney to prepare or supervise the preparation of an affidavit for an attachment or a writ of attachment; but if he does undertake to do so, and does it so negligently or unskillfully that his client in the progress of the cause suffers an injury by reason of such want of care and skill, the attorney is liable to an action. \* \* \* The degree of negligence necessary to charge him is a question of fact for the jury" (per Phelan, J., *Walker v. Goodman*, 21 Ala. [N. S.] 647).

placed in his hands for collection; but in such a case, it is a good defense that he sued one of the makers of the note in due course of law, and recovered a judgment which bound sufficient property to pay the debt, and that the plaintiff, by his own act, surrendered and vacated the judgment.<sup>1</sup>

§ 223. Where, however, the expediency of taking proceedings is doubtful, the attorney is justified in not prosecuting, unless specially directed to do so by his client.<sup>2</sup> If he disobeys the lawful instructions of his client, and a loss ensues, he is responsible,<sup>3</sup> notwithstanding he may have acted in good faith, and one what he honestly supposed to be for the interests of his client.<sup>4</sup> But he is not bound to proceed unless his fees are tendered or secured to him, if he makes that request,<sup>5</sup> and gives his client a reasonable notice of his intention to abandon the cause.<sup>6</sup>

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<sup>1</sup> Ransom v. Cothran, 6 Smedes & M. 167. Uniting in one suit, and taking a single judgment for several debts, some of which were secured by mortgage and some not, held not actionable negligence (Williams v. Reed, 3 Mason, 405).

<sup>2</sup> Crooker v. Hutchinson, 2 Chipm. 117; Lawrence v. Potts, 6 Carr. & P. 428.

<sup>3</sup> Gilbert v. Williams, 8 Mass. 51.

<sup>4</sup> Cox v. Livingston, 2 Watts & S. 103.

<sup>5</sup> Gleason v. Clark, 9 Cow. 57; Castro v. Bennett, 2 Johns. 296; Rowson v. Earle, Mood. & M. 538; Wadsworth v. Marshall, 2 Cr. & J. 665.

<sup>6</sup> In *Mordacai v. Solomon* (Sayer, 172), the court said that when an attorney has commenced a suit upon the credit of his client, he ought to proceed in it, although the client does not bring him money every time he applies for it. In *Cresswell v. Byron* (14 Ves. Jr. 272), Lord Eldon said: "The Court of Common Pleas, when I was there, held that an attorney having quitted his client before trial, could not bring an action for his bill." An attorney gave notice to his client on the Saturday before commission day (which was on the following Thursday) that he would not deliver briefs unless he was furnished with funds for counsel's fees. The money not being furnished, counsel was not instructed, and a verdict passed against the client. In an action against the attorney for negligence, it was held that the jury were properly directed to find for the plaintiff, if they thought the defendant had not given reasonable notice to the client of his intention to abandon the cause. The verdict was for the plaintiff (*Hoby v. Built*, 3 Barn. & Ad. 350. And see *Harris v. Osbourn*, 4 Tyrwh. 445; *S. C.*, 2 Cr. & M. 629; *Anon.*, 1 Sid. 31, pl. 8; *Love v. Hall*, 3 Yerg. 408; *Van Sandau v. Browne*, 9 Bing. 402; *Heslop v. Metcalfe*, 8 Sim. 622).

§ 224. Having instituted proceedings, the attorney is bound to prosecute them with diligence.<sup>1</sup> He will be liable for improperly dismissing his client's suit;<sup>2</sup> but a nonsuit against a client is not, *per se*, an evidence of negligence.<sup>3</sup> The defendant's attorney is liable for allowing a judgment to go by default without his client's consent;<sup>4</sup> but he is not liable for omitting to defend, if he has not been instructed in the defense.<sup>5</sup> He will not be liable for neglect to file a plea, when instructed so to do merely for delay;<sup>6</sup> and will be liable only for nominal damages, at least, if he can show that the defense he was employed to make was not a good one.<sup>7</sup>

§ 225. An attorney who neglects to take proper precautions consequent upon a material fact affecting his client's interests in a business pending, such, for example, as the death, marriage, or insolvency of a party, express notice of which is brought home to him, seems clearly guilty of negligence.<sup>8</sup> It is the attorney's duty to set aside irregular proceedings prejudicial to his client.<sup>9</sup> And it is held that,

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<sup>1</sup> *Fitch v. Scott*, 3 How. [Miss.] 314; *Ridley v. Tiplady*, 20 Beav. 44; *Frankland v. Cole*, 2 Cr. & J. 590.

<sup>2</sup> *Evans v. Watrous*, 2 Porter, 205. In England, it is clearly established that a counsel may, in his discretion, consent to a nonsuit (*Lynch v. Cowell*, 12 Law Times [N. S.] 548; *Chown v. Parrott*, 14 C. B. [N. S.] 74; *Swinfen v. Chelmsford*, 5 Hurlst. & N. 890; *Swinfen v. Swinfen* 1 C. B. [N. S.] 364, 400; see *post*, § 229).

<sup>3</sup> *Gleason v. Clark*, 9 Cow. 57; see *Gaillard v. Smart*, 6 Id. 385.

<sup>4</sup> *Godefroy v. Jay*, 7 Bing. 413; see *People v. Lamborn*, 1 Scam. 123.

<sup>5</sup> *Benton v. Craig*, 2 Mo. 198; see *Grayson v. Wilkinson*, 5 Smedes & M. 268; *Salisbury v. Gourgas*, 10 Metc. 442.

<sup>6</sup> *Johnson v. Alston*, 1 Campb. 176; *Pierce v. Blake*, 2 Salk. 515; see *Vincent v. Groome*, 1 Chitty, 182; *Anon.*, 1 Wend. 108; *Gilbert v. Williams*, 8 Mass. 51.

<sup>7</sup> *Grayson v. Wilkinson*, 5 Smedes & M. 268. It has been held that to make an attorney liable for not setting up in defense facts communicated to him by his client, the facts must be proved, or it must appear that they could have been proved (*Hastings v. Hallock*, 13 Cal. 203). A plaintiff's attorney is not liable for negligence in conducting a suit against excise officers for a seizure, if it appears that such seizure was lawful (*Atcheson v. Madock*, Peake, 162).

<sup>8</sup> *Stannard v. Ullithorne*, 10 Bing. 491; 4 Moore & S. 359; *Jacaud v. French*, 12 East, 317.

<sup>9</sup> *Godefroy v. Jay*, 7 Bing. 413.

being charged with the collection of a demand, he is bound to defend a replevin suit brought to obtain the possession of a debtor's property which he had caused to be attached, and is responsible for negligence in the defense.<sup>1</sup> So it is his duty to see that the recognizances entered into by a receiver in the action, are in proper form. Thus, where a solicitor represented to the court that a receiver then appointed had entered into the usual recognizances, which was not, in fact, true, the solicitor was held liable to the defendant for his loss in consequence of the receiver's liability being only in the nature of a simple contract debt.<sup>2</sup>

§ 226. As to the conduct of the trial, it is an attorney's duty to have the requisite witnesses in court,<sup>3</sup> and to attend the trial at the time appointed,<sup>4</sup> and at any stage of the cause where his presence may be requisite.<sup>5</sup> But an attorney is not answerable for the absence, neglect, or want of attention of the counsel he has retained.<sup>6</sup> Negligence may consist in unskillfully administering interrogatories for examination in chief of an adverse witness already examined on the other side.<sup>7</sup>

§ 227. A retainer to an attorney to prosecute a suit authorizes him to conduct it to final judgment and execution.<sup>8</sup> He will be liable, therefore, for not duly entering

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<sup>1</sup> *Smallwood v. Norton*, 20 Maine, 83. And in such a suit it is not competent for him to show, in reduction of damages, that the plaintiff in replevin was the real owner of the property (*Ib.*)

<sup>2</sup> *Simmons v. Rose*, 31 Beav. 1.

<sup>3</sup> *Reece v. Rigby*, 4 Barn. & Ald. 202; see *Price v. Bullen*, 3 Law J. [K. B.] 39.

<sup>4</sup> *Nash v. Swinburne*, 3 Man. & G. 630; *De Rouffigny v. Peale*, 3 Taunt. 484. See *Dax v. Ward*, 1 Stark. 409.

<sup>5</sup> *Dauntley v. Hyde*, 6 Jur. 163; or before an arbitrator in case of reference (*Swannell v. Ellis*, 1 Bing. 347; *Atcheson v. Madock*, Peake, 163).

<sup>6</sup> *Lowry v. Guilford*, 5 Carr. & P. 234.

<sup>7</sup> See *Stokes v. Trumper*, 2 Kay & J. 232.

<sup>8</sup> *Brackenburgh v. Pell*, 12 East, 588 (per Lord Ellenborough); *Lawrence v. Harrison*, Styles, 426.

up judgment,<sup>1</sup> or for not charging the defendant in execution,<sup>2</sup> if it is for the benefit of his client to do so,<sup>3</sup> or for not seasonably suing out *scire facias* against bail,<sup>4</sup> or for delaying to deliver an execution to the officer, whereby the right to issue an attachment is lost.<sup>5</sup> An attorney is liable for not giving notice of the putting in of bail that proves insufficient, the debtor having absconded and the debt being lost.<sup>6</sup> But an attorney is not bound to move for a new trial upon a point of law,<sup>7</sup> nor to institute new collateral suits without special instructions.<sup>8</sup>

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<sup>1</sup> Flower v. Bolingbroke, 1 Str. 639.

<sup>2</sup> Russell v. Palmer, 2 Wils. 325; Russell v. Stewart, 3 Burr. 1787; Pitt v. Yalden, 4 Id. 2060; Lee v. Ayrton, Peake, 119. Where a judgment debtor, not having been charged in execution, was improperly superseded (the two terms allowed by the rule of court not having expired), the attorney was held not liable as for negligence in not issuing execution (Laidler v. Elliott, 3 Barn. & Cr. 738). An attorney is not bound to attend personally to the levy of an execution (Williams v. Reed, 3 Mason, 405), nor to search for property (Pennington v. Yell, 6 Eng. [Ark.] 212; Ray v. Birdseye, 5 Denio, 619; affirming S. C., 4 Hill, 158).

<sup>3</sup> To maintain an action for negligence against an attorney for not issuing an execution on verdict obtained for his client, he deeming it not desirable to do so, there must be some evidence that it was desirable or for the benefit of the plaintiff to do so; or that he did not make due inquiry whether the debtor could pay. In such a case, the attorney is liable for the amount, if any, which the jury think execution would have realized for his client (Harrington v. Binns, 3 Fost. & F. 942). If he doubts the expediency of further proceeding, he should give notice to his client, and request specific instructions (Dearborn v. Dearborn, 15 Mass. 316).

<sup>4</sup> Dearborn v. Dearborn, 15 Mass. 316; Crooker v. Hutchinson, 1 Verm. 73; see Simmons v. Bradford, 15 Mass. 82. It is said that when an attorney undertakes the collection of a debt, it becomes his duty to sue out all processes, both mesne and final, necessary to effect that object; and not only the first execution, but all such as may become necessary. He is bound also to pursue bail, and those who may have become bound with the defendant in the progress of the suit, either before or after judgment. But he is not bound to institute new collateral suits without special instructions, such as actions against the sheriff for a failure of his duty (Pennington v. Yell, 6 Eng. [Ark.] 212).

<sup>5</sup> Phillips v. Bridge, 11 Mass. 246. And see Pitt v. Yalden, 4 Burr. 2060; Russell v. Palmer, 2 Wils. 225.

<sup>6</sup> McWilliams v. Hopkins, 4 Rawle, 382. And see Simmons v. Bradford, 15 Mass. 82.

<sup>7</sup> Hastings v. Halleck, 13 Cal. 203.

<sup>8</sup> Pennington v. Yell, 6 Eng. [Ark.] 212. But see Smallwood v. Norton, 20 Maine, 83.

§ 228. Questions have frequently arisen as to the extent, by virtue of his retainer, of an attorney's authority and general powers, to settle a suit without special instructions from his client. In the general management of the cause during its progress, the attorney acts under the authority implied by his retainer, and this authority is a very extensive one. Thus, he may waive objections to evidence, and stipulate for the admission of facts on the trial;<sup>1</sup> he may sue a writ of error,<sup>2</sup> or take an appeal, and bind his client by a recognizance in his name for the prosecution of it;<sup>3</sup> he may submit the cause to reference or arbitration;<sup>4</sup> he may bring a second suit, after a nonsuit on the first, for want of formal proof<sup>5</sup> or non-joinder of a necessary party;<sup>6</sup> and it seems he may discontinue a suit, where the client's rights are not concluded.<sup>7</sup> It has been held that he may waive the right of appeal;<sup>8</sup> but this has been denied.<sup>9</sup> An attorney cannot in general waive a judg-

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<sup>1</sup> *Alton v. Gilmanton*, 2 N. H. 520; *Talbot v. McGee*, 4 T. B. Monr. 375.

<sup>2</sup> *Grosvenor v. Danforth*, 16 Mass. 74.

<sup>3</sup> *Adams v. Robinson*, 1 Pick. 461.

<sup>4</sup> *Somers v. Balabrega*, 1 Dall. 164; *Holker v. Parker*, 7 Cranch, 436; *Buckland v. Conway*, 16 Mass. 396.

<sup>5</sup> *Scott v. Elmendorf*, 12 Johns. 315.

<sup>6</sup> *Crook v. Wright*, Ry. & M. 278.

<sup>7</sup> *Gaillard v. Smart*, 6 Cow. 385; but see *Evans v. Watrous*, 2 Porter [Ala.] 205.

<sup>8</sup> See *Union Bank of Georgetown v. Geary*, 5 Peters, 99; *Pike v. Emerson*, 5 N. H. 393.

<sup>9</sup> *People v. Mayor &c. of New York*, 11 Abb. Pr. 66. While the attorney has all the authority necessary for the conduct and management of the action, and for the collection of the debt, if any, his powers go no further. He has no further or greater authority, even if he thinks it, for the benefit of his client. He cannot stipulate not to appeal or seek a new trial (*Ib.*) Under a general retainer to prosecute or defend an action, the attorney is deemed employed to prosecute or defend for the purpose of obtaining a final judgment in favor of his client. His authority is not presumed to extend beyond the termination of the suit. Hence, it is to be presumed (on the question when the Statute of Limitation runs against his demand for costs), that on perfecting judgment in favor of his client, he may bring an action immediately to recover his costs (*Adams v. Fort Plain Bank*, 23 How. Pr. 45). An attorney's authority is determined on final judgment (*Macbeath v. Ellis*, 7 Bing. 578).

ment; but in a case where an attorney consented to vacate a judgment in his favor, and allowed the defendant to come in and answer on a state of facts on which the court, according to its customary practice, would make an order to that effect, it was held that such consent, and the failure of the defendant before judgment recovered, were not alone sufficient evidence of negligence to defeat an action by the attorney for his services.<sup>1</sup> These extensive powers, however, are exercised by an attorney at his peril. If the interests of his client do not require such acts or proceedings, or if they are in any way prejudicial to his client, he cannot recover for his services therein, and he is personally liable to his client for any costs or damages the latter may have, in consequence, sustained.<sup>2</sup>

§ 229. It is well settled in England that a counsel may consent to a nonsuit, or withdraw a juror, at the trial, if the interest of the client seem to require that course.<sup>3</sup> And it is held that the attorney for a defendant is not guilty of actionable negligence in compromising with-

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<sup>1</sup> *Clussman v. Merkel*, 3 Bosw. 402. But an attorney acts at his peril in waiving a judgment, and should be held responsible for any loss directly and naturally resulting from such action on his part (*Ib.*, per Bosworth, J. And see *Anon.*, 1 Wend. 108).

<sup>2</sup> An attorney has no power to release sureties (*Givens v. Briscoe*, 3 J. J. Marsh, 532), nor to enter a *retraxit* (*Lambert v. Sandford*, 2 Blackf. 137), nor to release a witness (*Marshall v. Nagel*, 1 Bailey, 308; *Bowne v. Hyde*, 6 Barb. 392). An authority given to attorneys to sue the maker of a note, does not empower them to release an indorser, without satisfaction or the consent of their clients (*East River Bank v. Kennedy*, 9 Bosw. 543).

<sup>3</sup> *Swinfen v. Chelmsford*, 5 Hurlst. & N. 890; *Swinfen v. Swinfen*, 1 C. B. [N. S.] 364, 400. But in the last case, Crowder, J., said: "But I am not aware that any counsel engaged in making terms, ever supposed for a moment that his opponent had power to bind his client without express instruction. Each acts upon the assumption that his adversary has his client's special authority to enter into the arrangement, which otherwise could not be concluded. If, therefore, in any such case, a counsel, under a misapprehension of his client's instructions, and believing himself to have authority, acts in fact without it, he cannot, in my opinion, bind his client."

out his client's consent, provided he acts in good faith and with reasonable care and skill, and the compromise is for the benefit of his client, and is not made in defiance of his express prohibition.<sup>1</sup> In this country, the powers of an attorney are more restricted. Without special authority from his client, he cannot settle a suit so as to conclude his client in relation to the subject in litigation.<sup>2</sup>

§ 230. It is well settled that an attorney prosecuting a suit to judgment cannot, by virtue of his general authority, discharge a defendant without the actual payment of the debt<sup>3</sup> in full,<sup>4</sup> and in current money.<sup>5</sup>

§ 231. Where an attorney is chargeable with negligence, an action lies immediately, though probably in

<sup>1</sup> Chown v. Parrott, 14 C. B. [N. S.] 74; see Prestwich v. Poley, 18 Id. 806; Lynch v. Cowell, 12 Law Times [N. S.] 548.

<sup>2</sup> "Counsel may make arrangements concerning the progress of the cause, as the putting off a trial and the like, without any special authority from the client; but they cannot settle the suit, and conclude the client in relation to the subject in litigation, without his consent" (per Bronson, C. J., Shaw v. Kidder, 2 How. Pr. 244). In Holker v. Parker, 7 Cranch, 436, Marshall, C. J., said: "Although an attorney-at-law merely as such, has, strictly speaking, no right to make a compromise, yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case."

<sup>3</sup> Simonton v. Burrell, 21 Wend. 362; Vail v. Jackson, 15 Verm. 314; see Hopkins v. Willard, 14 Id. 474; Bevins v. Hulme, 15 Mees. & W. 88; Kellogg v. Gilbert, 10 Johns. 220; Gullet v. Lewis, 3 Stewart, 23; Carter v. Talbot, 10 Verm. 471; Kirk v. Glover, 5 Stew. & Port. 340; Tankersly v. Anderson, 4 Desauss. 45.

<sup>4</sup> Langdon v. Potter, 13 Mass. 319; Lewis v. Gamage, 1 Pick. 347; Brackett v. Norton, 4 Conn. 517; Gray v. Wass, 1 Greenl. 257; Erwin v. Blake, 8 Peters, 18; Hudson v. Johnson, 1 Wash. 10; Savory v. Chapman, 11 Ad. & El. 829; Jackson v. Bartlett, 8 Johns. 361.

<sup>5</sup> He cannot take anything but money (Treasurers &c. v. McDowell, 1 Hill [S. C.] 184; Commissioners &c. v. Rose, 1 Desauss. 469). He cannot receive the notes of a third person in payment or as collateral security (Jeter v. Haviland, 24 Geo. 252). Under a general authority to collect a note, it has been held that an attorney has authority to receive a payment of part in money, and the residue in a note at two or three days, of a person of undoubted responsibility (Livingston v. Radcliff, 6 Barb. 201). "An attorney-at-law, on record, is authorized to do those things only which pertain to the conducting of the suit; and has no power to make a compromise by



that event only nominal damages could be proved or recovered; on the other hand, the proof of actual damages may extend to facts growing out of the injury, even up to the day of the verdict.<sup>1</sup> The damages do not necessarily extend to the nominal amount of the debt lost by the attorney's negligence, but only to the loss actually sustained.<sup>2</sup> An attorney, liable for a debt lost by his negligence, is not, of course, liable for the loss of the evidence of the debt; and in a suit against him for such loss, he may show that the plaintiff had another remedy which he has successfully pursued.<sup>3</sup> The existence of the debt, alleged to have been lost by the attorney's negligence, must of course be proved by competent evidence.<sup>4</sup>

§ 232. An attorney is also liable to his client for the consequences of his negligence and ignorance in matters not in litigation. Thus, he is liable for negligence in examining the title to property offered for sale to his client,<sup>5</sup> in drafting the form of attestation of an instru-

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which land is to be taken instead of money" (*Huston v. Mitchell*, 14 Serg. & R. 307). If an attorney takes payment in a depreciated currency, he is liable to his client for the amount of the depreciation (*Trumbull v. Nicholson*, 27 Ill. 149).

<sup>1</sup> *Wilcox v. Plummer*, 4 Peters, 172; and see *Marzetti v. Williams*, 1 Barn. & Ad. 415.

<sup>2</sup> *Dearborn v. Dearborn*, 15 Mass. 316; *Crooker v. Hutchinson*, 2 Chip. 117; see *Jones v. Lewis*, 9 Dowl. P. C. 143.

<sup>3</sup> *Huntington v. Rumnill*, 3 Day, 390.

<sup>4</sup> *Russell v. Palmer*, 2 Wils. 325; *Robinson v. Ward*, 2 Carr. & P. 59; see 2 Greenl. on Ev. § 148.

<sup>5</sup> *Ireson v. Pearman*, 3 Barn. & Cr. 799; *Brooks v. Day*, Dick. 572; *Brown v. Howard*, 4 J. B. Moore, 508; S. C., less fully reported, 2 Brod. & B. 73; *Wilson v. Tucker*, 3 Stark. 154; *Knights v. Quarles*, 4 Moore, 532; 2 Brod. & B. 202. If in the case of a proposed purchase of personal property, the attorney for the proposed purchaser takes no precautions against the same being seized for rent due from the vendor, he is negligent (see *Warne v. Kempster*, 1 Fost. & F. 695). In *Clark v. Marshall* (34 Mo. 429), it was held that a party who undertakes for a valuable consideration to furnish another with an abstract of title or statement of conveyances and incumbrances affecting a piece of land, and incorrectly reports the *quantity* of land previously conveyed, will be liable to respond in damages to the party who,

ment,<sup>1</sup> in omitting a seal where it is necessary,<sup>2</sup> or in allowing his client to execute a deed with an improper covenant.<sup>3</sup>

§ 233. In England, under the rule already stated, an attorney will not be held responsible for his opinion as to a doubtful title, and the advice of counsel may also relieve him; but in case he consults counsel, he is bound to examine fully the title deeds, and to lay the whole state of the title before him. If he gives only a partial abstract from a deed or will (even if such abstract is furnished by his client<sup>4</sup>), omitting subsequent important clauses, from which an erroneous assumption might easily arise, he is guilty of negligence.<sup>5</sup>

§ 234. An attorney employed to invest money on security is liable, if, through his want of ordinary skill, care, and prudence, the security turns out to be invalid or insufficient.<sup>6</sup> Under ordinary circumstances, the lender's

relying upon such information, purchases the land. (See *Gore v. Brazier*, 3 Mass. 543; *Hamilton v. Cutts*, 4 Id. 349; *Sprague v. Baker*, 17 Id. 586.)

<sup>1</sup> See *Elkington v. Holland*, 9 Mees. & W. 659.

<sup>2</sup> *Parker v. Rolls*, 14 C. B. 691.

<sup>3</sup> *Stannard v. Ullithorne*, 10 Bing. 491; 4 Moore & S. 359.

<sup>4</sup> *Wilson v. Tucker*, 3 Stark. 154.

<sup>5</sup> *Wilson v. Tucker*, 3 Stark. 154; *Ireson v. Pearman*, 3 Barn. & Cr. 799. In the last case, Bayley, J., said: "It may not be part of the duty of an attorney to know the legal operations of conveyances, yet it is his duty to take care not to draw wrong conclusions from the deeds laid before him, but to state the deeds to counsel whom he consults, or he must draw conclusions at his peril."

<sup>6</sup> *Donaldson v. Haldane*, 7 Clark & F. 762; *Brown v. Howard*, 4 J. B. Moore, 508; *Dartnall v. Howard*, 4 Barn. & Cr. 345. A plaintiff entered into a contract for the purchase of leasehold property under conditions of sale, one of which was that the purchaser should take an under lease, "according to the draft under lease already prepared, which will be produced at the time of sale, and may in the meantime be inspected at the office of Mr. H.; but no abstract of the vendor's title thereto shall be required, nor the lessor's title objected to or gone into." He afterward employed an attorney to complete the purchase, who failed to make the requisite search, or to investigate the vendor's title, or to require the production of the original lease. It subsequently appeared that the premises had been previously mortgaged, and the plaintiff was turned out of possession by the mortgagee. In an action against the

attorney is only bound to see that the security is *legally* sufficient for the stipulated purpose. Unless specially employed for that purpose, he is not bound to inquire into the sufficiency, in point of *value*, of the security offered, or of the personal responsibility of the borrower.<sup>1</sup> Where, however, he is retained to find an investment for money, and to see that it is a sufficient security therefor, he will be liable for the neglect of any precaution which a prudent man of competent skill would have taken.<sup>2</sup>

§ 235. An attorney who is professionally intrusted with the secrets of his client, is civilly liable for discovering those secrets to an opponent. Thus, where an attorney for the defendant assisted the plaintiff in obtaining execution against his client, he was held liable in damages;<sup>3</sup> and so where a solicitor, being employed to raise money on mortgage, disclosed to the proposed lender certain defects in his client's title, by reason of which the latter was put to the expense of a litigation, and was delayed in obtaining the money he wanted, and compelled afterward to give a higher rate of interest, it was held that this was a breach of duty for which the solicitor was liable, notwithstanding he had been the attorney for the proposed lender.<sup>4</sup> An attorney, however, is not liable for disclosing in evidence circumstances not confidentially communicated,<sup>5</sup> as, for example, the execu-

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executor of the attorney, it was held that the latter had been guilty of negligence, and that the plaintiff was entitled to recover, in addition to the amount he had paid to obtain a good title, interest on the same during the time he held possession, as he had been compelled to pay the mortgagee *mesne profits* during that period (*Allen v. Clark*, 11 W. R. 304; 7 Law Times [N. S.] 781).

<sup>1</sup> See *Green v. Dixon*, 1 Jur. 137; *Howell v. Young*, 5 Barn. & Cr. 529; *Dartnall v. Howard*, 4 Barn. & Cr. 345.

<sup>2</sup> *Haynes v. Rhodes*, 8 Q. B. 342. See *Whitehead v. Greethan*, 2 Bing. 464; *Watts v. Porter*, 3 El. & Bl. 743; *Craig v. Watson*, 8 Beav. 427.

<sup>3</sup> *Lawrence v. Harrison*, Styles, 426.

<sup>4</sup> *Taylor v. Blacklow*, 3 Bing. N. C. 225; 3 Scott, 614.

<sup>5</sup> See *Walker v. Wildman*, 6 Madd. 47; *Bramwell v. Lucas*, 2 Barn. & Cr. 745.

tion of a deed,<sup>1</sup> or a non-professional conversation with his client after judgment.<sup>2</sup> But to make the disclosure of a privileged communication actionable, it is not necessary that the communication should have been made in an action; if made in the course of a private negotiation, wherein the attorney's services were retained, it is sufficient.<sup>3</sup>

§ 236. The unskillfulness of one of two attorneys who are in partnership, is a good defense to a claim by the firm for their services.<sup>4</sup> And a retiring partner will not be relieved from liability for the firm's negligence by a dissolution of the firm.<sup>5</sup>

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<sup>1</sup> Bull. N. P. 284.

<sup>2</sup> See *Cobden v. Kendrick*, 4 T. R. 431.

<sup>3</sup> See *Greenough v. Gaskill*, 1 Myl. & K. 98; *Pulling on Attorneys*, 3d ed. 225.

<sup>4</sup> *Warner v. Griswold*, 8 Cow. 665; *Livingston v. Cox*, 6 Penn. St. 360.

<sup>5</sup> *Cholmondeley v. Clinton*, 19 Ves. Jr. 261; *Cooke v. Rhodes*, Id. 273, note. Trust money was sent to A., one of a firm of solicitors, who was himself one of two trustees, for investment on mortgage. The money was paid into the bankers to the account of the firm, and was afterward drawn out by A., and never invested. Held, that the other member of the firm was liable (*Eager v. Barnes*, 31 Beav. 579. See *Arden v. Tucker*, 4 Barn. & Ad. 815; *Kell v. Naiby*, 10 Barn. & Cr. 20; *Ward v. Lee*, 13 Wend. 41; *Perrins v. Hill*, 2 Jurist, 858; *McFarland v. Crary*, 6 Wend. 297; affirming S. C., 8 Cow. 253). In *Ayrault v. Chamberlain* (26 Barb. 83), after the commencement of a foreclosure suit, the partnership of the plaintiff's attorneys was dissolved, and the suit was continued by a new firm composed of one of the members of the old firm and of C. During the progress of the suit, C. retired from the firm, and a year afterward, the remaining partner collected the money. Held, that C. could not be made liable for the default of the remaining partner in not paying over the money.

## CHAPTER XII.

### BANKERS AND BILL COLLECTORS.

Sec. 237. Who are bankers.

238. Foundation of obligation to use care in collection of bills.

239. Duty to present bill for payment or acceptance.

240. Duty to give notice of dishonor of bill.

241. Liability for negligence of sub-agents.

242. Personal liability of sub-agents.

243. Collection by notary.

244. Who may sue for banker's negligence.

245. Banker not bound to sue upon paper.

§ 237. Commercial paper being for the most part collected through banks, it is usual to treat of the proper method of making such collections with special reference to bankers, although there are other classes of collecting agents. We have therefore chosen this title under which to state the duties and liabilities appertaining to the collecting business, and use the word "bankers" as inclusive of the entire class of collecting agents conducting an independent business as such.

§ 238. The obligations hereinafter stated are founded upon the recognized customs and necessities of business, and arise from the mere fact of the acceptance of paper for collection. No express contract is necessary, nor is it even material that the banker should receive or be entitled to receive any special compensation for the service. The fact that a banker receiving paper for collection may reasonably expect that, according to the usual course of business, the proceeds may lie in his hands for a longer or shorter time, is a sufficient consideration for his undertaking to collect in the ordinary manner.<sup>1</sup>

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<sup>1</sup> *Smedes v. Utica Bank*, 20 Johns. 372; affirmed 3 Cow. 662; *Bank of Utica v. McKinster*, 11 Wend. 473; affirming S. C., 9 Id. 46; see *Curtis v. Leavitt*, 15 N. Y. 9, 167.

§ 239. A banker or other agent who receives negotiable paper for collection is bound to use ordinary diligence in presenting it, so as to secure the rights of the owner of the paper against all the parties thereto;<sup>1</sup> and he is liable for all the loss suffered by his principal in consequence of his neglect to do so, even though his omission was caused by his mistaking the date on the paper, if the true date could have been ascertained by the use of ordinary care.<sup>2</sup> If it is payable at sight, or if no time of payment is specified by its terms, he should present it for payment upon the same day that he receives it, if by the use of ordinary diligence he can do so,<sup>3</sup> although presentment the day after it is received is sufficient.<sup>4</sup> On the other hand, it is negligence to present a negotiable paper for payment too soon, *e. g.*, before the expiration of grace.<sup>5</sup> A bill of ex-

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<sup>1</sup> By failing to demand payment of a note or bill left with it for collection, a bank makes the note or bill its own, and becomes liable to the owner for the amount (*Bank of Washington v. Triplett*, 1 Pet. 25; *McKinster v. Bank of Utica*, 9 Wend. 46; *Tyson v. State Bank*, 6 Blackf. 225; *Bank of Montgomery v. Knox*, 1 Ala. [N. S.] 148; see *Bank of Mobile v. Huggins*, 3 Id. 206). But where the necessity of a particular presentment is not judicially settled, the agent is not liable for his mistaken view of the law. Thus, the holder of a post-note, which was issued by a bank that failed before the note fell due, sent it to another bank for collection, and this bank caused payment to be demanded, and notice of non-payment to be given to the indorsers, on the day the note was due, without grace, whereby the indorsers were discharged on the ground that by law the promisors were entitled to grace on the note, although they had while solvent paid such notes without grace. The holder thereupon brought an action against the collecting bank, to recover damages for negligence in not making such demand and giving such notice as would hold the indorsers. It appeared on the trial that at the time when the note fell due, the question whether banks were entitled to grace on their post-notes had never been decided, and that there was no uniform practice as to demanding payment of such notes, and giving notice to the indorsers after the promisors failed. Held, that the action could not be maintained (*Mechanics' Bank v. Merchants' Bank*, 6 Metc. 19). An agent who has reason to expect the arrival of a draft at his office for the benefit of his principal, is bound, if he leaves the office for several days together, to leave authority with some one to open letters and present the draft, in case of its arrival during his absence (*Brady v. Little Miami R. Co.*, 34 Barb. 249).

<sup>2</sup> *Bank of Delaware County v. Broomhall*, 38 Penn. St. 135.

<sup>3</sup> *Commercial Bank v. Union Bank*, 11 N. Y. 203.

<sup>4</sup> *Kelty v. Second National Bank*, 52 Barb. 328; *Merchants' Bank v. Spicer*, 6 Wend. 443; *Mohawk Bank v. Broderick*, 13 Wend. 133.

<sup>5</sup> *Ivory v. Bank of Missouri*, 36 Mo. 475.

change payable at a future day must be presented immediately for acceptance, no matter whether it requires an acceptance to fix the time of its payment or not;<sup>1</sup> and if such acceptance is refused, he must give notice thereof in the same manner as when payment is refused at the maturity of a bill. If for any reason the parties to the instrument are chargeable with notice of its dishonor, without its presentment, or if they have all waived such presentment, and it would have been a useless form to present it, the collecting agent is not liable for omitting to do so.<sup>2</sup>

§ 240. It is universally held to be the duty of a collecting agent to give notice to his principal of the dishonor of a negotiable instrument.<sup>3</sup> But in some states, and partic-

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<sup>1</sup> This is a matter of course when the bill is by its terms payable at a certain time after sight, since, otherwise, presentment might be delayed indefinitely (*Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; see *Commercial Bank v. Union Bank*, 11 N. Y. 203). But it is equally required when the bill is payable at a specified day, or at a certain term after its date (*Walker v. Bank of State N. Y.*, 9 N. Y. 582).

<sup>2</sup> A banker with whom a draft is lodged for collection is not liable for neglect to present it, where presentment was not necessary to charge the parties, and would have been useless if made (*Mobley v. Clark*, 28 Barb. 390).

<sup>3</sup> *Van Wert v. Wooley*, 3 Barn. & Cr. 419. This is conceded in all the cases cited below. A bank receiving a bill for collection is bound in the discharge of its obligations, if the bill has not been accepted, to present the same for acceptance without unreasonable delay, as well as to present the same for payment when it becomes payable; and if not accepted when presented for that purpose, or not paid when presented for payment, it must take such steps by protest and notice as are necessary to charge the drawer and indorser (*Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; *Van Wert v. Wooley*, 3 Barb. & Cr. 419; see also *Fabens v. Mercantile Bank*, 23 Pick. 330; *Branch Bank v. Knox*, 1 Ala. [N. S.] 148; *Bank of Mobile v. Huggins*, 3 Id. 206; *Thompson v. Bank of South Carolina*, 3 Hill [S. C.] 77; *Riley*, 81). Where a bank received for collection a note payable in another state, under an agreement to collect it for seven per cent., and neglected to give information of non-payment, and to return the note to the depositor within a reasonable time, held that the bank was liable (*Wingate v. Mechanics' Bank*, 10 Penn. St. 104); and it further appearing that at the time of trial the note was barred by the statute of limitations, and that the bank had never until then returned it to the depositor, and there being no evidence of the insolvency of the maker, held that the measure of damages was the amount due on the face of the note, with interest, less the seven per cent. to be paid for collection (*Ib.*)

ularly in New York, it is further held to be the duty of bankers, and other persons undertaking the collection of paper as a business, to give notice of dishonor to all the parties liable to be charged on the instrument, in such manner and time as to charge them with their proper liability.<sup>1</sup> For although it would be sufficient for the protection of the principal that the agent should give notice to him alone, leaving him to notify the prior parties to the bill, and this even though the principal is himself only a collecting agent, yet it is the usage among bankers, when employed to collect negotiable paper, to give notice of dishonor to all the parties, in order to save the principal the trouble, and it may be assumed that such is the general custom among bill collectors. The principal has, therefore, a right to suppose that the agent has attended to this duty, and may hold him responsible for his neglect to do so. This custom is not recognized by the courts of Massachusetts; and it is, therefore, held in that state that a banker is not, except by special agreement, bound to give notice of the dishonor of negotiable paper intrusted to him for collection to any one except his immediate principal.<sup>2</sup> Even under the New York rule, if the principal distinctly knew that the agent had neglected to give

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<sup>1</sup> *Smedes v. Bank of Utica*, 20 Johns. 372; affirmed, 3 Cow. 662; *M'Kinster v. Bank of Utica*, 9 Wend. 46; affirmed, 11 Id. 473; *Allen v. Merchants' Bank*, 22 Wend. 215; reversing S. C., 15 Id. 434; *Montgomery Bank v. Albany Bank*, 7 N. Y. 459; affirming S. C., 8 Barb. 396; *Walker v. Bank of State of N. Y.*, 9 N. Y. 582; affirming S. C., 13 Barb. 636. This seems also to be the law in Pennsylvania and some other states (see *West Branch Bank v. Fulmer*, 3 Penn. St. 399; *Thompson v. Bank of South Carolina*, 3 Hill [S. C.] 77; *Riley*, 81; *Bank of Mobile v. Huggins*, 3 Ala. [N. S.] 206).

<sup>2</sup> A bank receiving from another bank a bill or note for collection is bound to present the same for payment, and if the same is not paid at maturity, to give due notice of the dishonor *to the bank from which the note was received*; but it is not required, unless by special agreement, to give notice to any other party to the note (*Phipps v. Millbury Bank*, 8 Metc. 79; and see *Colt v. Noble*, 5 Mass. 167; *Eagle Bank v. Chapin*, 3 Pick. 180; *Bank of United States v. Goddard*, 5 Mason, 366; see *Haynes v. Birks*, 3 Bos. & P. 599).



notice to a party to the instrument, he would not be at liberty to refrain from giving such notice, if not too late for him to do so, and hold the agent liable for damage which might thus be obviated. And where the principal cannot suffer any prejudice from the lack of such notice, the agent is not liable for his omission to give it.<sup>1</sup>

§ 241. A banker or professional bill collector is not, properly speaking, the *agent* of a person depositing paper with him for collection, except to a limited extent. The two stand independent of each other. The relation of master and servant clearly does not exist between them; and the banker, although clothed with an authority from the owner of the instrument to demand and receive its value, is at liberty to choose his own method of collection, free from any control on the part of the owner. It is therefore perfectly clear (especially in view of the later decisions in respect to the law of master and servant) that persons employed by a banker to collect the paper of his customers are the agents of the banker, for whose acts he must answer to his customers as if they were his own. This is the well-settled law of New York;<sup>2</sup> and although, partly from their failure to perceive that this question was involved in the general law of master and servant, and

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<sup>1</sup> A bank receiving a bill for collection, or as collateral security only, is bound to follow the usual course of business, and give notice of non-payment to the indorser; but if the indorser have knowledge of the non-payment, or for other reasons the notice be unnecessary, the bank will not be liable for a neglect to notify (*West Branch Bank v. Fulmer*, 3 Penn. St. 399).

<sup>2</sup> When a bank, or broker, or other dealer receives, upon good consideration, a note or bill for collection in the place where such bank, broker, or dealer carries on business, or at a distant place, the party receiving the same for collection is liable for the neglect, omission, or other misconduct of the bank or agent to whom the note or bill is sent, either in the negotiation, collection, or paying over the money, by which the money is lost, or other injury sustained by the owner of the note or bill, unless there be some agreement to the contrary, express or implied (*Allen v. Merchants' Bank*, 22 Wend. 215; *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; *Commercial Bank v. Union Bank*, 11 N. Y. 203; *Hoard v. Garner*, 3 Sandf. 179).

partly from the confused ideas which were until lately prevalent in respect to that branch of the law, the Supreme Court of the United States, and the courts of Massachusetts, Maryland, Mississippi, Louisiana, and of some other states, have held that a banker is not liable for the default of a person whom he has selected with due care to collect paper deposited with him for collection at a distant place,<sup>1</sup> we have no hesitation in saying that these courts have erred. Their error may have given rise to a usage in their respective states sufficiently general to warrant their adherence to the rule adopted by them, but as an original proposition, it was certainly wrong. The argument by which it is supported, namely, that it cannot be expected that a banker will employ one of his own servants to collect bills at a distance, is of no weight. The banker is not expected in any case to give his personal attention to the collection of bills. Why then should he not escape liability for the acts of his immediate servants (for whose

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<sup>1</sup> See §§ 425, 426, *post*. Bills of exchange payable at distant places, and left with a bank for collection, are presumed to be intended to be transmitted to, and collected by, suitable sub-agents at the places where payable; since it cannot be expected that a bank will employ one of its own officers to journey about and collect such bills. In such case, therefore, as in case of bills expressly left with a bank for transmission only, if the bank in good faith employ suitable sub-agents for collection, it is not liable for their neglect or default (*Bank of Washington v. Triplett*, 1 Pet. 25; *Fabens v. Mercantile Bank*, 23 Pick. 380; *Dorchester & Milton Bank v. New England Bank*, 1 Cush. 177; and see *Ætna Ins. Co. v. Allen Bank*, 25 Ill. 243). A bank in which bills of exchange are deposited for transmission only, fulfills its duty by sending them to the bank to which they are to be transmitted for collection, and is not responsible for any laches of that bank (*Mechanics' Bank v. Earp*, 4 Rawle, 384; *Wingate v. Mechanics' Bank*, 10 Penn. St. 104). But the banker must give his agent all the necessary information which he has himself. Thus, where bankers at A. received for collection a note payable at B., and were notified that there were two persons of the same name as the indorser, one residing at A. and the other at B., and that the latter was the indorser; there being nothing on the face of the note to show this, held that it was their duty to transmit these instructions to their correspondents at B., upon sending to them the note for collection, and that no custom could absolve them from this duty, which was of the very essence of their undertaking, namely, the fixing of the indorser's liability (*Borup v. Nininger*, 5 Minn. 523).

neglect he is confessedly responsible)<sup>1</sup> as well as for the neglect of agents whom he employs at a distance? When paper is deposited in a bank avowedly for the mere purpose of transmission to another bank selected by the owner of the paper, and responsible to him, the former bank is of course not liable to him for the negligence of the other bank.

§ 242. It naturally follows, from the principles upon which the respective rules are founded, that in New York the owner of a negotiable instrument, deposited with a banker for collection, cannot in general maintain an action for negligence in its collection against any one but the banker with whom he deposited it;<sup>2</sup> while in the other states, mentioned in our last section, the owner may sue the person actually in fault, though not directly employed by him.<sup>3</sup> In New York, if the fault was that of any one employed by the bank, whether in the same town, or at a distance, and whether a servant of the bank, or a person or corporation in an independent business, the bank alone can sue the party in fault, except as hereafter stated.

§ 243. How far a banker is liable for the neglect or

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<sup>1</sup> If the bank employs one who is not a notary to give notice, and he neglects, the bank is liable (*Bellemire v. Bank of U. States*, 4 Whart. 105; 1 Miles, 173).

<sup>2</sup> *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; *Commercial Bank v. Union Bank*, 11 N. Y. 203.

<sup>3</sup> See § 425, *post*. Where a bill is delivered by the payee to a bank to be transmitted for collection, the bank to which it is accordingly transmitted becomes the agent of the payee, and answerable to him alone for any breach of its duty in relation to the bill. If, by the mistake of the latter bank, the first-mentioned bank pays over the value to the payee, and the bill proves to be dishonored, the first-mentioned bank can recover back the money on the payee's indorsement; and any breach of duty upon the part of the other is no defense (*Farmer's Bank v. Owen*, 5 Cranch C. C. 504). The holders of a bill payable in Washington indorsed it, and intrusted it to the M. Bank, to be transmitted to a bank in Washington for collection. The cashier of the M. Bank indorsed it, and sent it to the Bank of Washington, together with other bills, and without any statement of the ownership. Held, that the Bank of Washington might be liable to the real owners of the bill for failure of duty in collecting (*Bank of Washington v. Triplett*, 1 Peters, 25).

misconduct of a notary public to whom he has given his principal's note or bill for protest, is a question not free from difficulty. In Massachusetts, Connecticut, Illinois, Pennsylvania, Maryland, Mississippi, Wisconsin, and Louisiana, the banker is not answerable for the failure of the notary to perform his duty;<sup>1</sup> the rule being generally stated to be that where the banker exercises reasonable prudence in the selection of a competent and trustworthy notary, he has done his whole duty; and this, in cases where any other person could have been employed, instead of a notary. In New York,<sup>2</sup> and South Carolina,<sup>3</sup> bankers

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<sup>1</sup> So held in Massachusetts (*Fabens v. Mercantile Bank*, 23 Pick. 332; *Warren Bank v. Suffolk Bank*, 10 Cush. 582); in Connecticut (*East Haddam Bank v. Scovier*, 12 Conn. 30); in Illinois (*Ætna Ins. Co. v. Alton City Bank*, 26 Ill. 243); in Pennsylvania (*Bellemire v. Bank of the United States*, 4 Whart. 105; 1 Miles, 173); in Maryland (*Jackson v. Union Bank of Maryland*, 6 Harr. & J. 146; *Citizens' Bank v. Howell*, 8 Md. 530); in Mississippi (*Tieman v. Commercial Bank of Natchez*, 7 How. [Miss.] 648; *Bowling v. Arthur*, 34 Miss. 41); in Wisconsin (*Stacey v. Dane County Bank*, 12 Wise. 629); and in Louisiana (*Baldwin v. Bank of Louisiana*, 1 La. Ann. 13; *Frazier v. New Orleans Gas &c. Co.*, 2 Rob. [La.] 294; see § 425, *post*). In an action against a bank for negligence in not duly demanding of the maker payment of a note left by the plaintiff with it for collection, the defense was that the note was duly placed by the defendant in the hands of a competent notary public for demand and protest, and that the negligence, if any, was on his part. The defendants had been the collecting agents for the plaintiffs for more than ten years, and had invariably placed their notes in the hands of a notary for demand and protest, with the knowledge of the plaintiffs. Held, 1. That evidence was admissible on behalf of the defendants, that the usage was invariable among the banks of Boston, including the defendants, when notes are sent to them for collection, to keep the same for payment until the close of banking hours, and if not then paid, to put them in the hands of a notary for demand and protest, and that the defendants did this in the present case. 2. That if these facts were established, the defendants were not responsible for the negligence of the notary (*Warren Bank v. Suffolk Bank*, 10 Cush. 582). In an action against a bank for negligence in not making necessary demand and protest of a note left with the bank for collection, the bank, by showing the delivery of the note to a notary public for demand and protest in due time, is, *prima facie*, exonerated from liability. It is not sufficient for the plaintiff to prove, in general terms, that the notary was a man of dissipated habits; to rebut such *prima facie* case, he must prove that the notary was drunk at the time the note was given to him, or that his habits were so universally intemperate as to disqualify him for the discharge of an official act (*Agricultural Bank v. Commercial Bank*, 7 Smedes & M. 592; compare *Gerhardt v. Boatman's Savings Institution*, 38 Mo. 60).

<sup>2</sup> *Allen v. Merchants' Bank*, 22 Wend. 215; reversing S. C., 15 Id. 482.

<sup>3</sup> *Thompson v. Bank of South Carolina*, 3 Hill [S. C.] 77.

to whom paper has been transmitted for collection, are answerable for the negligence of notaries employed by them. But in these cases the neglect of the notary arose in a matter which did not require any official action as a *notary*—such as the giving of notices of non-acceptance or non-payment, a thing which the banker's cashier, or other servant, could have done with equal propriety.<sup>1</sup> So the protest of an inland bill being entirely superfluous, a banker who employs a notary to collect such a bill makes him his agent.<sup>2</sup> But it may well be doubted whether even in New York, a banker is responsible for the misconduct of a notary in a strictly official function. Notaries are commissioned public officers, whose office gives to their protest of foreign bills a peculiar authority and effect. A banker having such a bill to collect, is bound to employ a notary for the purpose. And although the banker may have a selection among hundreds of notaries, as to the one to whom he will intrust his business, it cannot, we think, be said that as to strictly official acts, such a notary is the agent of the banker. He is an independent public officer, and for any negligence, omission, or other fault in the discharge of his official duty, in a matter requiring official action, he, and he alone, is responsible. Where, therefore, a notary is employed to protest a foreign bill of exchange, he is liable to any person injured by his neglect in so doing; for he acts in such cases as an officer, and not as a mere agent. This is the law of New York, as well as of all other states.<sup>3</sup>

§ 244. The duty of a banker to collect paper left with him for collection, not being founded on express contract,

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<sup>1</sup> *Bank of Rochester v. Gray*, 2 Hill, 227; see *Coddington v. Davis*, 1 N. Y. 189; *Cowperthwaite v. Sheffield*, 1 Sandf. 449; S. C. affirmed, 3 N. Y. 243.

<sup>2</sup> *Thompson v. Bank of South Carolina*, 3 Hill [S. C.] 77.

<sup>3</sup> *Commercial Bank of Kentucky v. Varnum*, N. Y. Supreme Ct. 1869.

but on an implied agreement arising from the custom of banks, the duty is raised, or the agreement implied in behalf of such person as may be beneficially interested in having the duty performed; so that if A. leaves a note for collection, and B. becomes the owner of it before the time for the performance of the duty arrives, the latter is the proper person to bring the suit for an injury arising from the neglect of that duty.<sup>1</sup>

§ 245. A deposit of negotiable paper with a banker for collection, only imposes upon him the duty of receiving the money if paid, and if not paid, of making such demand of payment, and causing to be given such notices of demand and non-payment, as are necessary to fix the liability of the different parties to the paper. It is no part of the duty of a banker to employ counsel and bring suit upon notes left with him on deposit.<sup>2</sup> It is otherwise, however, in the case of a deposit of a note by a debtor with his creditor, as a collateral security for debt. In such a case, the creditor is bound to take every step requisite, not only to fix the liability of the parties to the note, by presentment and notice of dishonor, but he is further bound, in case of non-payment, to prosecute the parties with reasonable diligence and skill. If by reason of his failure to do so, the debt is lost, it is imputed to him as laches, and the debtor will be discharged from his original obligation.<sup>3</sup>

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<sup>1</sup> Bank of Utica v. McKinster, 11 Wend. 473. The Bank of P. by arrangement with the Bank of W. redeemed its circulation, and paid its drafts on the credit of its remittances for collection; and having received from them, under this arrangement, a draft indorsed in blank and payable at sight, indorsed it for collection to a third bank. Held, that the Bank of P. could maintain an action against such third bank for neglect to charge the parties to the draft, or for the money collected. Under such an arrangement, it was the legal owner of the draft (Commercial Bank v. Union Bank, 11 N. Y. 203).

<sup>2</sup> Crow v. Mechanics' & Traders' Bank, 12 La. Ann. 692.

<sup>3</sup> Wakeman v. Gowdy, 10 Bosw. 208; Hart v. Hudson, 6 Duer, 294; Lawrence v. McCalmont, 2 How. [U. S.] 427; see Swinyard v. Bowes, 5 Maule & Sel. 62; Burt v. Horner, 5 Barb. 504; see Story on Bills, § 872.

## CHAPTER XIII.

### BRIDGES.

- Sec. 246. Bridges distinguishable from highways.  
247. What constitutes a bridge at common law.  
248. By whom repairable.  
249. Bridges across navigable streams.  
250. Management and protection of drawbridges.  
251. The obligation of toll-bridge companies.  
252. The approaches to a bridge constitute a part of it.  
253. Abutments, embankments, and railings.

§ 246. As a public bridge is merely a species of highway, we shall defer to the chapter under that general head all consideration of the questions relating to the proper construction and maintenance of bridges, and treat in this place only of those matters which appertain to bridges as distinguished from ordinary highways.<sup>1</sup> The term "highway" does not import a bridge, and therefore to charge a party with neglect in building or repairing a bridge, it must be by the term "bridge," which alone describes such a structure.<sup>2</sup> There is a distinction between a common highway and a bridge in the circumstances which constitute them. A roadway becomes a highway by *user* for a sufficient period; but a bridge must have been built before it can be traveled, so that the public may have the use of it, not upon sufferance, but as a matter of right.<sup>3</sup> But a bridge of public utility, though built by an individual for

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<sup>1</sup> For illustrations of negligence in the construction and maintenance of bridges, the reader should therefore consult the chapter on HIGHWAYS, §§ 343-422.

<sup>2</sup> *State v. Canterbury*, 8 Foster, 195; *State v. Boscawen*, *Ib.* A bridge is not a "highway" within the provisions of the English statute exempting from toll, materials for a "highway" carried along a turnpike (*Osmond v. Widdicombe*, 2 Barn. & Ald. 49).

<sup>3</sup> Woolrych says (*Law of Ways*, 196): "The principal circumstance necessary to constitute a public bridge, is that the people at large may have a free and uninterrupted use of it, not upon sufferance, but as a matter of right."

his own convenience, if dedicated to, and accepted by, the community, is a public bridge.<sup>1</sup> So the public may adopt a bridge by passing over it.<sup>2</sup> But merely using the bridge unavoidably does not amount to an adoption.<sup>3</sup>

§ 247. A bridge is said to be a mere substitute for a ferry.<sup>4</sup> At common law it is indispensable to the character of a bridge repairable by the county that it should cross a stream or watercourse,<sup>5</sup>—*flumen vel cursus aquæ*,—and these words have been held to denote water flowing in a channel

<sup>1</sup> *Rex v. Bucks*, 12 East, 192; *Rex v. Yorkshire*, 2 Id. 342; *Rex v. Glamorgan*, 2 Id. 356, note; *Rex v. Northampton*, 2 Maule & S. 262; *Rex v. Devon*, 1 Ry. & M. 144; *State v. Campton*, 2 N. H. 513. In *Rex v. Middlesex* (3 Barn. & Ad. 201) it appeared that a carriage bridge had been built before 1119, and that certain abbey lands had been ordained for the repairs of the same, and the proprietors of those lands had always repaired the bridge so built. In 1736 the trustees of a turnpike road, with the consent of a certain number of the proprietors of the abbey lands, constructed a wooden foot bridge along the outside of the parapet of the carriage bridge, partly connected with it by brickwork and iron pins, and partly resting on the stonework of the bridge. Held, on an indictment for non-repair of the foot bridge, that the bridge was not parcel of the carriage bridge, which the proprietors of the abbey lands were bound by tenure to repair, and consequently that the county was liable to repair the foot bridge. So trustees, under a turnpike act, having built a bridge across a stream where a culvert would have been sufficient, though a bridge is better for the public, the county cannot refuse to repair such bridge on the ground that it was not absolutely necessary (*Rex v. Lancashire*, 2 Barn. & Ad. 813).

<sup>2</sup> *Rex v. Kent*, 2 Maule & S. 513.

<sup>3</sup> *Rex v. Kerrison*, 3 Maule & S. 526; *Rex v. Kent*, 13 East, 220; *Rex v. Lindsay*, 14 Id. 317. Though a bridge be generally used by the public, yet if it were built over a private way by an individual for his own benefit, he is not indictable for suffering it to be out of repair (*State v. Seawell*, 3 Hawks, 193. But see *Heacock v. Sherman*, 14 Wend. 58).

<sup>4</sup> Per Savage, C. J., *People v. Saratoga & Renss. R. Co.*, 15 Wend. 133.

<sup>5</sup> Coke, 2 Inst. 701. The ancient form of indictment, as mentioned by Lord Coke, was *quod pons publicus et communis situs in alta regis via super flumen seu cursum aque*, &c. "In many indictments in modern times," as remarked by Lord Tenterden (*Rex v. Oxfordshire*, 1 Barn. & Ad. 300), "the words *super flumen*, &c., are omitted—but in such indictments they must be considered as virtually included in the true import of the word bridge; for otherwise, all such indictments would be vicious, there being many structures bearing the name of bridge erected across a deep ravine, and in modern times over an ancient road, crossed in a transverse direction by a new road having no reference to water, and which unquestionably the county is not bound to repair" (see *Rex v. Salop*, 13 East, 95; *Rex v. Lindsay*, 14 Id. 517; *Rex v. Northampton*, 2 Maule & S. 262; 1 Bishop on Criminal Law, § 183).



between banks more or less defined, although such channel may be occasionally dry.<sup>1</sup> It has been, however, very much questioned whether a defined channel or a constant stream are requisite; and it has been held that a structure of arches made to carry a highway in such a manner as to permit flood waters to flow in their accustomed course should be treated as a bridge, though, at ordinary times, there may be no water under them.<sup>2</sup> The mere fact of an arch passing over a stream will not necessarily make it a bridge, under the common law obligation of counties to repair bridges.<sup>3</sup> Such a structure may be a culvert: whether it is a bridge or not is a question for the jury.<sup>4</sup>

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<sup>1</sup> *Rex v. Oxfordshire*, 1 Barn. & Ad. 289; and see *Rex v. Whitney*, 3 Ad. & El. 69; *Rex v. Trafford*, 1 Barn. & Ad. 874; 8 Bing. 204; *Rex v. Kent*, 2 East, 342; *Rex v. Northampton*, 2 Maule & S. 262; *Rex v. Devon, Ry. & M.* 144; *Rex v. Buckinghamshire*, 4 Campb. 189.

<sup>2</sup> *Regina v. Derbyshire*, 2 Q. B. 745, 756, per Denman, C. J. In that case a structure, 1,275 feet in length, consisted of forty-two arches, divided at some points by a stone causeway, at others by piers only. A common highway passed over it. A river flowed constantly under five of the arches at one end of the structure; a brook flowed constantly under an arch at the opposite end. The other arches lay across meadow land, under all of which in times of flood water flowed, and under most of them there was stagnant water at all times. It was held that the whole structure must be deemed a bridge repairable by the county, there being no general rule of law that arches under which there is not a constant running stream cannot form a part of a county bridge. The decision in this case, however, was based mainly on the ground that the county had immemorially repaired the whole structure, and had rebuilt and widened several of the arches under which there was no constant stream. In New York, commissioners of highways are not bound to cause the repair of bridges other than those over streams—*e. g.*, bridges over a ravine or pond. In respect to the latter class, their duty is simply to give directions. Therefore a complaint against them for negligently permitting a bridge to be out of repair must either show that the bridge was over a stream, or, if not of that class, that the defendants had neglected to give directions for its repair (*Smith v. Wright*, 27 Barb. 621; reversing S. C., 24 Id. 170).

<sup>3</sup> *Rex v. Whitney*, 3 Ad. & El. 69, 71, per Denman, C. J.

<sup>4</sup> *Ib.* *Tolland v. Willington*, 26 Conn. 578. In *Regina v. Gloucestershire* (1 Carr & M. 506), a bridge had been built over a stream which was never known to be dry, though very shallow in winter. It was a part of a sheet of water crossing low land, and at the place where the bridge crossed it, it was confined by embankments to prevent it from overflowing the adjoining meadows. The judge left it to the jury to say whether the structure was a bridge over a stream of water.

The fact of its being without parapets is not decisive of its character as a bridge.<sup>1</sup>

§ 248. In England there have long existed two systems of laws applicable to bridges and to highways. In that country, the repair of public bridges is, *prima facie*, a charge upon the county, as the repair of highways is a charge upon the parish.<sup>2</sup> Of course, a hundred or parish, or other known portion of the county, may, by usage and custom, be chargeable with the repair of a bridge erected within it.<sup>3</sup> In this country, bridges and highways have not been, as a general thing, treated as distinct and separate subjects of legislative provision. They are considered to be portions of the highways which pass over them,<sup>4</sup> and their maintenance is confided to the same corporate bodies or public officers, upon whom rests the duty of maintaining the highways.<sup>5</sup> Thus, in the New England states, the

<sup>1</sup> *Rex v. Whitney*, 2 Ad. & El. 69.

<sup>2</sup> The inhabitants of a county are bound to repair every public bridge within it, unless they can show that some other person, or body politic or corporate, is liable (*Rex v. Buckinghamshire*, 12 East, 192; and cases, *infra*). The county is not liable in an action brought against it through the name of its surveyor (*M'Kinnon v. Penson*, 8 Exch. 319; affirmed, 9 Id. 609).

<sup>3</sup> *Rex v. Ecclesfield*, 1 Barn. & Ald. 359. A parish may be indicted for the non-repair of a bridge, without stating any other ground of liability than immemorial usage (*Rex v. Hendon*, 4 Barn. & Ald. 628; *Rex v. Machynlleth*, 2 Barn. & Cr. 166). A corporation, either in respect of a special tenure of certain lands, or in respect of a special prescription, and also any person, by reason of a special tenure, may be compelled to repair bridges (*Rex v. Stratford-upon-Avon*, 14 East, 348).

<sup>4</sup> Thus, under a statute requiring all highways to be not less than sixteen feet wide, all bridges must be of the same width (*Rush v. Davenport*, 6 Iowa, 443).

<sup>5</sup> See *Hill v. Livingston*, 12 N. Y. 52. "The common law responsibility of counties for the repair of bridges never prevailed in New York" (per Johnson, J., *Ib.*) In that case, the franchise of a toll bridge (which was over a stream dividing two towns) having ceased, and the commissioners of highways having neglected to repair it, the supervisors of the county appointed a commissioner to repair it, and appropriated some funds of the county at large toward payment, and apportioned the requisite balance nearly equally between the two towns, and caused the same to be levied as a part of the annual tax. Held, that the maintenance of such bridge was not a county charge, but that it was to be repaired, like other bridges, by the towns. The bridges which the counties, as such, are bound to maintain are few, and form exceptions, created by statutes, to the general rule. So in California, the county is not liable for

maintenance of public bridges is imposed upon the towns,<sup>1</sup> in other states, it is imposed upon counties,<sup>2</sup> and in still other states, upon independent public officers. The bridges thus repairable are not alone those which answer the common law requisite of spanning a water-course. Unless the import of the term is limited by statute, it means any structure by which a highway is carried over a place. A bridge has, therefore, been defined to be "a building constructed over a river, creek, or other stream, or over a ditch or other place, in order to facilitate the passage over the same."<sup>3</sup>

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a defective bridge (*Huffman v. San Joaquin*, 21 Cal. 426; see Acts of March 26 and 28, 1855, § 9, 5). The duty of keeping the bridges and public roads in repair is performed by agents appointed by the county, and an action for negligence in the performance of that duty will lie against the agent, not against the county (*Hedges v. County*, 1 Gilm. 567).

<sup>1</sup> In Connecticut and Massachusetts, the duty of repairing bridges is imposed on towns, unless they can show that some other corporation or individual is bound to do it (*Lewis v. Litchfield*, 2 Root, 436; *Swift v. Berry*, 1 Id. 449; *Eldredge v. Pomfret*, 1 Id. 270; *Lobdell v. New Bedford*, 1 Mass. 153). In New Hampshire, the duty of repairing bridges is now devolved on towns; counties are no longer, in any case, liable thereto (*State v. Campton*, 2 N. H. 513; *State v. Canterbury*, 8 Foster, 195; *State v. Boscawen*, Id. 195).

<sup>2</sup> In Alabama, where a bridge or causeway has been built by contract with the county commissioners, with a guaranty by bond or otherwise that it shall continue safe for travelers for a certain period, any person injured may sue in his own name on the bond or guaranty, and recover damages for the injury; and if no guaranty has been taken, or the period named in the bond has expired, he may sue and recover damages of the county (Code, § 1203). In Iowa, the statute requires the county to keep in repair the bridges within its limits. The liability for damages arising from non-repair rests therefore upon the county, and not upon the supervisor of the road district in which the bridge lies (*Wilson v. Jefferson*, 13 Iowa, 181; *Kendall v. Lucas County*, 26 Iowa, 395). In New Jersey, it is the duty of the county board of chosen freeholders to keep all public bridges in repair, but prior to 1859 it was not liable to an individual for an injury sustained by a defect in a bridge (*Board of Chosen Freeholders v. Strader*, 3 Harrison, 108; see *Livermore v. Freeholders &c.*, 5 Dutch. 245). In South Carolina, every county, parish or district is bound to keep its bridges in repair at its own expense (*Shoolbred v. Corporation &c.*, 2 Bay, 65). In Virginia, the county courts are by law directed to build bridges across public roads, and a *mandamus* will lie to compel them (*Brander v. Chesterfield*, 5 Call, 548; *Dinwiddie Justices v. Chesterfield*, 5 Call, 556; see *Sampson v. Goochland*, 5 Gratt. 241). Consult also our chapter on HIGHWAYS, *post*.

<sup>3</sup> 1 Bouv. Law Dict. 224. Wharton (Lexicon, 114) defines a bridge to be "a building of brick, wood, or iron, erected across a river, ditch, valley, or other place

§ 249. A bridge built across a navigable stream without lawful authority is a public nuisance, the erection of which is punishable by public prosecution.<sup>1</sup> It is said that there are three cases in which authority from the legislature is necessary to erect a bridge over a stream: first, where the stream is navigable; second, where the state owns the bed of the stream; and third, where the right to take toll is desired.<sup>2</sup> But a bridge, though built under a competent authority, should be constructed and afterward maintained so as not to impede or impair the navigation of the stream. A condition in a charter, authorizing the erection of a bridge over a navigable stream so that it shall not "injure, stop, or interrupt the navigation," is not performed by building the bridge in such a manner as to do as little injury as possible to the navigation as it existed at the time the bridge was built. If at any subsequent time the navigation is so interrupted, the proprietors are liable to the injured party for the damages thereby sustained.<sup>3</sup>

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otherwise impassable, for the convenience and benefit of travelers." A bridge built over a public *highway* is repairable by the parties for whose exclusive benefit it was built (*Heacock v. Sherman*, 14 Wend. 58).

<sup>1</sup> *Arundell v. McCulloch*, 10 Mass. 70; *Ex parte Jennings*, 6 Cow. 518; *Lansing v. Smith*, 4 Wend. 9, 24; *Browne v. Schofield*, 8 Barb. 239; *Rose v. Graves*, 3 Dowl. Pr. [N. S.] 61. But because a bridge over a navigable river may be a nuisance to those navigating it, it does not follow that it is a nuisance as to others who do not navigate it (*Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44). In the last case, the defendant attempted to build a free bridge on his own land across the Mohawk River, which is only partially navigable. In an action by the proprietors of a toll bridge across the same stream, to restrain the erection as a public nuisance, it was held that as the bridge did not impede or impair navigation, it was not a public nuisance. In *Rex v. West Riding of Yorkshire* (2 East, 342), it was held that a bridge built in a public way, without public utility, is indictable as a nuisance; and so it is if built colorably in an imperfect or inconvenient manner, with a view to throw the onus of rebuilding or repairing it immediately on the county. And see *Rex v. Glamorgan*, 2 East, 356, *note*. A bridge, built without authority, cannot impose any obligation on the inhabitants of the town where it may be to keep it in repair (*Commonwealth v. Charlestown*, 1 Pick. 180).

<sup>2</sup> *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44, 63, per Mullin, J.

<sup>3</sup> *Dugan v. Bridge Company*, 27 Penn. St. 303. In such a case, if the bridge,

§ 250. Where a bridge is furnished with a draw, the proprietors owe a duty to navigators to provide requisite tackle for raising the draw, and to raise the same when required by vessels desiring to pass through.<sup>1</sup> And so they owe a duty to travelers upon the bridge, to protect the draw, when opened, by sufficient barriers or other suitable means. Thus, where the draw of a bridge had been lawfully opened in the night by some boatmen to let their boat through, a traveler on the bridge walked off into the open draw, and was drowned, there being no barrier or light, the proprietors of the bridge were held liable.<sup>2</sup>

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when built, is no obstruction, a change in the channel from artificial causes created by third parties cannot affect the rights of the company; otherwise, if such change is the result of natural causes, influenced in their operation by the piers of the bridge (Ib.) See *post*, § 250. A proviso in a charter to erect a bridge over a navigable river, that the structure should not be erected "in such a manner as to injure, stop, or interrupt the navigation of the river by boats, rafts, or other vessels," is a limitation of the franchise only, and not a rule of liability to injured navigators (*Monongahela Bridge Co. v. Kirk*, 46 Penn. St. 112). The bridge must be altered, if necessary to accommodate the increase of travel (*Manley v. St. Helen's Canal Co.*, 2 Hurlst. & N. 840).

<sup>1</sup> *Patterson v. East Bridge Co.*, 40 Maine, 404; see *Davis v. Jerkins*, 5 Jones, [N. C.] Law, 290. Where a charter required "suitable" draws, the bridge company is bound to enlarge their draw, if rendered necessary for the convenient accommodation of vessels having occasion to navigate the river; and the question whether the draws are thus suitable, is to be determined by the courts and not by the bridge company (*Commonwealth v. New Bedford Bridge Co.*, 2 Gray, 339). But in *Commonwealth v. Breed* (4 Pick. 460), it was held that where an individual was authorized by legislature to build a bridge over navigable water, with a draw not less than fifteen feet wide, he was not bound to make the draw wider than fifteen feet, although vessels of a greater breadth had been accustomed to sail in such water, or to make a wharf or pier to the draw.

<sup>2</sup> *Manley v. St. Helen's Canal & R. Co.*, 2 Hurlst. & N. 840. It seems that it would be otherwise if the boatmen, after having passed, had wrongfully left the bridge open at the time of the accident (Ib.) The plaintiff, with two companions, was crossing a drawbridge over a canal owned by the defendants. While the defendants' servant was in the act of moving the bridge, to permit a boat to pass, the plaintiff walked upon it. No chain or rope was placed across the bridge, nor was any warning given not to go on it. The bridge rose when the plaintiff was on it, and she leaped from it, knocking one of her companions down and severely injuring herself. Held that the defendants were liable, it being negligence on the part of the servant not to put up a chain or rope across the bridge when it was being ele-

§ 251. The proprietors of turnpikes and toll-bridges are not common carriers, nor subject to the severe responsibilities of such carriers: they are bound to use only ordinary care and diligence in the construction of their roads and bridges, and in keeping them in proper order.<sup>1</sup> Merely giving notice to travelers of the dangerous condition of a bridge apparently safe, will not absolve the proprietors from liability so long as they keep the bridge open and take toll.<sup>2</sup>

§ 252. Where the maintenance of a bridge is imposed upon one, and the maintenance of the highway leading to and across it is imposed upon another, the question sometimes arises as to the distance from the extremities of the structure of the bridge at which the responsibility of the one ends and of the other begins. By the common law of England, a space of three hundred feet from either end of the bridge is to be taken as part of the bridge itself, and, as such, is repairable by the county.<sup>3</sup> No such precise and definite rule prevails in this country. To what distance

vated (*Niven v. Edinburgh &c. Canal Co.*, 11 F. C. 19; *Hay*, 48. But compare *Wetherley v. Regent's Canal Co.*, 12 C. B. [N. S.] 2).

<sup>1</sup> *Bridge Co. v. Williams*, 9 Dana, 403. But the mere opinion and belief of the Proprietors of a bridge that it is safe, will not excuse them from liability for injuries arising from its defects: they should avail themselves of the judgment of such as are disinterested, skillful, and experienced in such matters (*Ib.* See *Orcutt v. Kittery Point Bridge Co.*, 53 Maine, 500; *State v. Zanesville & Maysville Turnpike Co.*, 16 Ohio St. 308; *Chase v. Cabot &c. Bridge Co.*, 6 Allen, 512; *Gringsby v. Chappell*, 5 Rich. Law, 443). By statute, in Connecticut, turnpike companies are bound to repair all bridges which they build, if their charters do not designate what bridges they shall build. But if, when erecting them, they insist that the town ought to build and support them, they are not bound to repair them (*Canaan v. Greenwoods Turnpike Co.*, 1 Conn. 1.)

<sup>2</sup> *Randall v. Cheshire Turnpike*, 6 N. H. 147.

<sup>3</sup> *Rex v. West Riding of York*, 7 East, 588; *Rex v. Devon*, 14 Id. 477. So a person who is liable by prescription to repair a bridge, is also, *prima facie*, liable to repair the highway to the extent of three hundred feet from each end. Such presumption is not rebutted by proof that the party has been known only to repair the fabric of the bridge) and that the only repairs known to have been done to the highway were done by the public (*Regina v. Lincoln*, 8 Ad. & El. 65).

from either end of the bridge a bridge company is bound to repair the approaches to the bridge, is to be determined by the statute which grants the franchise, or, if not declared by statute, then by a consideration of what is reasonable under the circumstances.<sup>1</sup> Where a bridge company has practically adopted, as a part of its bridge, a way which connects the bridge with the highroad, the company is responsible for the condition of such way as a part of its bridge, though such connecting way was made by individuals.<sup>2</sup> It is clear that the approaches to a bridge should not be of a less width than the bridge itself; but a question has arisen whether such approaches should not conform in width with the road leading to it. Where a railroad company was required by statute to carry over the railway, by bridges of a certain width, all turnpikes with which its road should intersect, it was held that the company could not be compelled to restore such parts of a turnpike as had been appropriated for the approaches to a bridge, to their original width, the approaches being of the same width as the bridge.<sup>3</sup>

§ 253. The term bridge imports not only the structure itself and its approaches, but its abutments<sup>4</sup> and embankments and railings,<sup>5</sup> all of which must be kept so furnished

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<sup>1</sup> *Commonwealth v. Deerfield*, 6 Allen, 449.

<sup>2</sup> *Watson v. Lisbon Bridge*, 14 Maine, 201.

<sup>3</sup> *Regina v. Birmingham & Gloucester R. Co.*, 2 Q. B. 47. But see *Rex v. Regent's Canal Co.*, 1 Railw. Cas. 323; 1 Redf. on Railw. 190.

<sup>4</sup> *Sussex v. Strader*, 3 Harrison, 108; *Parker v. Boston & Me. R. Co.*, 3 Cush. 107). An abutment to a bridge, as matter of description, is part of the bridge; and where a declaration alleged an injury to have been occasioned by the insufficiency of a bridge, and the proof was, that the defect and insufficiency was in the abutment, it was held, that this was not such a variance as to be ground for reversing the judgment (*Bardwell v. Jamaica*, 15 Verm. 438). The word "bridge," under the Connecticut statute, includes the structure itself and such abutments as are necessary to make the structure accessible and useful (*Tolland v. Wilmington*, 26 Conn. 578).

<sup>5</sup> Under the Vermont statute, which renders turnpike companies liable to pay damages that may happen to any person, from whom toll is demandable, and which

that travelers may safely pass. Where the space spanned by a bridge has been, after a lapse of years, reduced by extending the embankments from time to time into the river, such embankments are repairable as parts of the bridge.<sup>1</sup>

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may arise from neglect of any bridge, &c., within their limits, it was held, where a long, high bridge was made, with railings on the sides, and the company, after the railings had decayed and fallen, or been removed, permitted it to be passed, with no protection on the sides except a line of timber, eighteen inches square, placed upon the floor of the bridge, that this was a neglect of the bridge within the statute (*Holley v. Winooskie Turnpike*, 1 Aik. 74).

<sup>1</sup>*Tolland v. Willington*, 26 Conn. 578. In that case, the bridge was originally one hundred and fifty feet long. But, by extending the embankments, it had been reduced to a length of sixty-five feet. Two adjoining towns, T. and W., were bound to repair the bridge. In consequence of the want of a railing on the embankment in the town of T., the plaintiff was injured, and it was held that the two towns were jointly liable. Evidence that the selectmen of both towns had for so long a time built and maintained the whole one hundred and fifty feet, whether embankment or bridge, as the joint duty and at the joint expense of the towns, was held to be admissible to show their joint liability.



## CHAPTER XIV.

### CANALS.

- SEC. 254. State canals.
- 255. Obligation of canal companies to keep canal navigable.
  - 256. Statutory requirement as to depth, &c., to be followed.
  - 257. When canal company liable as a common carrier.
  - 258. Maintenance of bridges over canals.
  - 259. Maintenance of canal banks, and management of surplus water.
  - 260. Repair of towing path, and fencing canal.

§ 254. In many of the states, canals have been built, and are maintained, at the expense and for the profit of the state. The duty of managing their use, and of maintaining them in proper repair, is intrusted to certain public officers or boards of commissioners, who are personally liable for their neglect of such duty. The general rules which govern the liability of such officers for personal misconduct have been sufficiently stated in our chapter on PUBLIC OFFICERS, and need not be recapitulated here.

§ 255. Private persons or corporations, who own and operate a canal which they invite the public to use upon the payment of tolls, are bound, so long as they keep it open, to exercise ordinary and reasonable care in keeping it in such repair that it may be navigated with safety to person and property.<sup>1</sup> But they do not guaranty that

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<sup>1</sup> Lancaster Canal Co. v. Parnaby, 11 Ad. & El. 223. This is a leading case, and has been repeatedly cited and followed both in England and in this country. It appeared that a boat had sunk in the defendant's canal, so that vessels passed with difficulty in the day time, and at night were in danger of running foul of it. The defendant had notice of the obstruction, but took no steps to raise it, nor to place a light near it at night; and the plaintiff's boat, during the night time, ran foul of it and was sunk, and its cargo damaged. It was held that, independent of the provisions of the defendant's charter requiring it to raise sunken boats, the common law imposed on the defendant the duty to take reasonable care, so long as it kept its canal

their canal shall not at any time, or under any circumstances, be in such a condition as to render its navigation temporarily dangerous. They are liable only for a want of ordinary and reasonable care in keeping it in proper repair and free from obstructions. Thus, where a boat, in navigating a canal, was injured and sunk by striking against a stone at the bottom of the canal, of the existence of which the canal company had no knowledge, it was held that the mere presence of the stone in the canal did not raise a presumption of negligence.<sup>1</sup>

§ 256. Where the depth or width of the canal is prescribed by statute, the proprietors are bound to maintain it at the required depth or width. Their failure to do so creates a public nuisance; and a navi-

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open for the public use of all who chose to navigate it, to keep it free from obstructions dangerous to the safety of those who might navigate it. Tindal, C. J., said: "We concur with the Court of Queen's Bench in thinking that a duty of this nature is imposed upon the company, and that they are responsible for the breach of it, upon a similar principle to that which makes a shopkeeper, who invites the public to his shop, liable for neglect in leaving a trap-door open without any protection, by which his customers suffer injuries." The remedies against a canal company, provided by the act of incorporation, for the injuries arising from the construction of dams, as a part of the navigable highway, do not exclude the common law remedies for injuries arising from an abuse of the privileges granted to the company, or for the neglect of its duties (*Schuylkill Nav. Co. v. McDonough*, 33 Penn. St. 73).

<sup>1</sup> *Exchange Fire Ins. Co. v. Delaware & Hudson Canal Co.*, 10 Bosw. 180. Robert-son, J., said: "The canal, like a highway or railroad, if used by others, is a mere instrument of use and profit belonging to the defendants, which they are bound to keep in proper order for use. If they tempt the public to use it, and neglect proper precautions to make it navigable and safe, they are undoubtedly liable for damages for such neglect. And the rule is of universal applicability to individuals as well as public bodies, that they who induce others to make use of an instrument or article belonging to them, for a particular purpose, they retaining its possession, are bound to be innocent of all negligence in keeping it in a proper condition to be used, at the peril of being responsible for damages. \* \* \* Unless they owned the canal-boats, they could reap no benefit from either the simulated or real destruction of them or their cargoes, and therefore there is no reason for putting them on a footing with common carriers, so as to render them insurers. No case has been cited which goes this length. \* \* \* It would be unreasonable to require the defendants to sound and drag the whole length of their canal perpetually to ascertain what obstructions might lie at the bottom, or to keep guards along the banks to prevent the commission of injuries by designing persons."

gator who is specially damaged by reason of the insufficient depth or width of the canal, has an action against the proprietors.<sup>1</sup>

§ 257. When the proprietors of a canal also own and run boats upon it, by which they carry passengers or property for hire, they become, as to such passengers or property, common carriers, and assume a higher obligation than that which we have just mentioned. This obligation, in so far as it comes within the scope of this work, is treated of in the subsequent chapter on CARRIERS OF PASSENGERS.

§ 258. The obligations of a canal company do not exist in favor only of those who navigate its canal, or for whom it transports persons or property. It owes a duty to the public at large to see that its canal, locks, bridges, and other property are so constructed, maintained, and managed, as not to cause injuries to others.<sup>2</sup> Canal companies are invariably required by statute to erect bridges, by which intersected highways may be carried over the canal; and sometimes they are required to maintain them in repair. In either case, they must use reasonable and ordinary care to construct such bridges on a proper plan, and with suitable materials, and to keep them afterward in a reasonably safe state of repair.<sup>3</sup> And a bridge, suffi-

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<sup>1</sup> *Riddle v. Proprietors of Locks & Canals &c.*, 7 Mass. 169. In that case, the proprietors of a canal were bound by their charter to construct it so deep and wide that rafts of a certain description could pass through it when the same could pass the river with which it was connected. Held, that they were liable to the owner of such a raft, of whom they had received toll, for all damages suffered by him in consequence of the canal not being sufficient to pass the raft, without evidence that it could have passed the river. And see *Proprietors of Quincy Canal v. Newcomb*, 7 Metc. 276.

<sup>2</sup> Where a canal company has pumped foul water into its canal, so as to make the canal a nuisance, it is no defense that the foulness was caused by other persons (*Attorney-General v. Bradford Navigation Co.*, 35 Law J. [Ch.] 619.)

<sup>3</sup> See *Union Canal Co. v. Pinegrove*, 6 Watts & S. 560; *Lowell v. Proprietors of Locks & Canals*, 7 Metc. 1; *Gautrell v. Egerton*, Law Rep. 2 C. P. 371; *Leopard v.*

cient to accommodate the travel when it is made, must nevertheless be enlarged and improved, if necessary to accommodate the business which in course of time comes upon the highway.<sup>1</sup>

§ 259. As to maintaining the banks of the canal, so as to prevent breaks, and as to the management of surplus water, so as to prevent the flooding of adjacent lands, the proprietors are liable only for the want of ordinary care.<sup>2</sup> Some nice questions have arisen between canal proprietors

Ches. & Ohio Canal Co., 1 Gill, 222. Where a canal company is empowered to intersect highways, to construct bridges to connect the intercepted portions, and to take tolls, and it erects swing-bridges, which the boatmen are entitled to open for the purpose of passing, and which, when opened, leave the edge of the canal unprotected, and for want of sufficient light or other means of preventing accidents, a person falls into the canal, while the bridge is lawfully opened at night time, without any fault on his part, the company will be liable to an action (*Manley v. St. Helen's Canal & R. Co.*, 2 Hurlst. & N. 840). An indictment, charging an individual with the repair of a bridge by reason of his being owner and proprietor of a certain navigation, is not equivalent to charging him *ratione tenuræ*, but is erroneous. It seems that a count charging him by reason of being owner of a navigation under a private act of parliament must set forth the act (*Rex v. Kerrison*, 1 Maule & S. 435). See our chapters on BRIDGES, *ante*, pp. 276-285; and HIGHWAYS, *post*.

<sup>1</sup> *Manley v. St. Helen's Canal & R. Co.*, 2 Hurlst. & N. 840.

<sup>2</sup> See *Proprietors of Quincy Canal v. Newcomb*, 7 Metc. 276. A canal company is not liable for damage caused by a mere accidental breach of their canal (*Higgins v. Ches. & Del. Canal Co.*, 3 Harringt. 411; see *Staffordshire & Worcester Canal Co. v. Hallen*, 6 Barn. & Cr. 317). In a case, however, where the banks of a canal were in imminent danger of breaking away by reason of the surplus water in the canal, and the canal company, in order to protect the banks and to preserve the navigation, let off the water through a waste-weir upon adjacent land, it was held that the owner of such land might recover his damages, although the discharging of the water was done prudently, and in a manner to do as little damage as possible. But in such a case, the act complained of being done for the protection of the defendant's own property, the question of negligence would not arise, except possibly on the question of damages (*Hooker v. New Haven & Northampton Co.*, 15 Conn. 312). In *Whitehouse v. Birmingham Canal Co.* (27 Law J. [Exch.] 25), it was held that where the injury was not occasioned willfully, nor by any act necessarily causing it, but arose from the ordinary use of the work (as, for instance, through the overflow of the water of the canal), negligence was the essence of the action; and although the jury gave a verdict for the plaintiff, and it was proved that the proximate cause of the injury was the raising of a flood-gate, yet it being doubtful whether that act necessarily must have caused the injury, and the jury having found that there was no negligence, the verdict was entered for the defendant.

and the owners of adjacent water power, or lessees of surplus water, as to the use of such surplus water. In general, the canal proprietors have no right to use more water than is necessary for the proper operation of their works, and if they needlessly and improperly take away any part of the water to which another has a right, they will be liable for the consequent damage.<sup>1</sup>

§ 260. The towing path of a canal is a public highway, but only for the purposes for which it was made.<sup>2</sup> The proprietors of the canal do not owe any duty to persons, other than navigators, to keep the towing path in repair, except, possibly, where they have appropriated a part of the public highway for their use as such. Nor are they under any general obligation to fence the canal. Thus, where a canal was constructed by the side of a public footway, at a distance of several feet from the towing path, but the distinction between the footway and towing path had become obliterated, and the public had been permitted to travel on the intermediate space without objection, it was held that the canal proprietors were not liable for the death of one who had quitted the footway, and, in consequence of the dangerous state of the canal, fell in and was drowned.<sup>3</sup>

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<sup>1</sup> *Lynch v. Stone*, 4 Denio, 356. A charter obligation to keep a lock, excludes the right of passing any water through the lock, though necessary to the lower part of the canal, except that which passes when barges are lowered through the lock (*Blakemore v. Glamorganshire Canal Co.*, 2 Cr. M. & R. 133; S. C. in error, 1 Clark & F. 263; and see a previous case between the same parties, reported in 3 Younge & J. 60).

<sup>2</sup> *Rex v. Severn & Wye R. Co.*, 2 Barn. & Ald. 646, 648, per Bayley, J.

<sup>3</sup> *Binks v. South Yorkshire R. & River Dun Co.*, 3 Best & S. 244. See *Hardcastle v. South Yorkshire R. & Co.*, 4 Hurlst. & N. 67.

## CHAPTER XV.

### CARRIERS OF PASSENGERS.\*

- Sec. 261. Obligation of carrier not merely in contract.
- 261 *a.* Who are common carriers of passengers.
262. Who are deemed to be passengers.
263. Obligation of carrier as to free passengers.
264. Obligation as to persons not lawfully on vehicle.
265. Carrier of passengers liable only for negligence.
266. The degree of care required.
267. Absolute duty to provide safe vehicles.
268. Carrier always liable for negligent defect in vehicle.
269. Carrier's liability for the condition of the road.
270. Railroad company not bound to guarantee track.
271. Liability of railroad lessees, &c.
272. Liability for accidents beyond carrier's line.
273. Limitation of liability by special contract.
274. Restrictions on liability, how far valid.
275. When the obligation of a carrier commences.
- 275 *a.* When it ceases.
276. Negligence in starting and stopping.
277. Duty to stop at platforms.
278. Duty to assist passengers in getting on and off.
- 278 *a.* Duty to maintain guard against egress.
- 278 *b.* Duty to preserve order.
279. Obligation of stage-coach proprietors.
280. What is sufficient evidence for plaintiff.
- 280 *a.* Presumption of negligence, how rebutted.
281. What is contributory negligence.
282. What is not contributory negligence.
283. Negligence in getting on and off a vehicle.
284. Violation of statute forbidding use of platforms, &c.
- 284 *a.* Negligence in being in improper part of vehicle.
285. Negligence in changing from car to car.

§ 261. The obligations of a common carrier of persons, though usually sanctioned by express or implied contract, are by no means dependent upon contract exclusively, or even mainly, for their existence. They owe their origin

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\* The obligations of carriers of goods are absolute; and their liability does not depend upon their being negligent. For this reason, we have not considered that subject as falling within the scope of this treatise.

chiefly to the policy of the common law, adopted for the protection of human life, and to various statutory enactments in furtherance of that policy.<sup>1</sup> This will plainly appear from the rules which govern the obligations of carriers to gratuitous passengers, and from the limitations which are affixed to their power to make contracts exempting themselves from liability. Nevertheless, the legal obligations of a carrier, being called into activity by the action of each person separately who offers himself as a passenger, are in the nature of a contract; and no one can complain of their breach except the person with whom or for whose benefit the contract was made, who can rarely be other than the passenger himself.<sup>2</sup>

§ 261 a. Any person or corporation, making it a regular business to carry persons for hire or advantage of any kind,

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<sup>1</sup> The duty which arises in a case of gratuitous undertaking to convey a passenger, to exercise some degree of skill and care, is independent of any contract, expressed or implied, and is imposed by the circumstances of the case (per Selden, J., *Nolton v. Western Railroad Co.*, 15 N. Y. 444. To the same effect, see *Phil. & Reading R. Co. v. Derby*, 14 How. [U. S.] 468; *Great Northern R. Co. v. Harrison*, 10 Exch. 376; *Gillenwater v. Madison &c. R. Co.*, 5 Ind. 339; *Ohio & Miss. R. Co. v. Muhling*, 30 Ill. 9). The carrier of passengers owes a duty to them as carrier, though there may be no privity of contract between him and them. Thus, the owners of a line of canal boats, engaged in the business of common carriers of passengers and goods, who charter a boat to another transportation company for a single trip, retaining the charge of it and navigating it with their own master and crew, are liable to a passenger for the loss of his goods upon the passage (*Campbell v. Perkins*, 8 N. Y. 430). Where a duty was cast by act of Parliament (1 & 2 Vict. c. 88) upon a railway company to carry any officer of the post-office whom the postmaster-general might select, for which service the company was to be remunerated by the postmaster-general, and the plaintiff was the officer selected, and was injured by defendant's negligence in carrying him, held, upon demurrer, that it was the defendant's duty to carry plaintiff with proper care and diligence, and that for breach of such duty, to the injury of plaintiff, he might well sue the company in an action on the case, though there was no contract between him and defendant, but the duty arose, simply from the obligation imposed upon the defendant by act of Parliament (*Collett v. London & Northwestern R. Co.*, 16 Q. B. 984).

<sup>2</sup> *Fairmount Pass. R. Co. v. Stutler*, 54 Penn. St. 375; *Alton v. Midland R. Co.*, 19 C. B. [N. S.] 213. But this rule does not prevent a recovery, under a statute authorizing a parent, &c., to sue in case of death caused by negligence (*Pennsylvania R. Co. v. Bantom*, 54 Penn. St. 495).

is a common carrier between the places to and from which he is accustomed to transport persons.<sup>1</sup> The owner of a stage, a railroad car, a ship, or a ferry-boat,<sup>2</sup> is, if he carries on such a business by means of such vehicles, a common carrier of persons.

§ 262. A passenger is a person who undertakes, with the consent of the carrier, to travel in the conveyance provided by the latter, otherwise than in the service of the carrier as such. Any acts, indicating, on the one side, an offer or request to carry or to be carried, and, on the other side, an acceptance of such offer or request, are sufficient.<sup>3</sup> It is not necessary, in order to create the relation of carrier and passenger, that the latter should have actually entered the vehicle, much less that the vehicle should have started on the journey with him. Where the carrier provides a waiting-room for passengers, entry into that room, with intent to travel under the carrier's charge, is sufficient to give the rights of a passenger.<sup>4</sup> Where it is the practice of the carrier to stop for passengers when hailed, the fact that he stops for a person hailing him is sufficient evidence that he accepts such person as a passenger; and from that moment the relation begins.<sup>5</sup> The question of a

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<sup>1</sup> Bennett v. Peninsula Steam Packet Co., 6 C. B. 775.

<sup>2</sup> Shimmer v. Merry, 23 Iowa, 90.

<sup>3</sup> In an action for damages brought by a passenger, for injuries caused by the carelessness of the driver, in overturning the coach, it was held, that the fact that the driver was informed, before the accident, that a passenger was to be left at the plaintiff's destination, and that, after the accident, the agent of the defendant informed the driver that the plaintiff was to stop at the station designated, was sufficient to establish, *prima facie*, the allegation in the complaint, of a contract to safely carry (Thorne v. California Stage Co., 6 Cal. 232).

<sup>4</sup> Gordon v. Grand St. & Newtown R. Co., 40 Barb. 546.

<sup>5</sup> In an action for negligence, the declaration stated that the plaintiff had agreed to become a passenger by the defendant's omnibus, and that the defendant received the plaintiff as such passenger. Plea, that the plaintiff did not become a passenger, and that the defendant did not receive him as such. It appeared that the plaintiff held up his finger to the driver of the omnibus, who stopped to take him up, and that, just as the plaintiff was putting his foot on the step of the omnibus, the driver



person's right to claim a passage is immaterial for this purpose, if the carrier accepts him as such.<sup>1</sup> The purchase of a ticket, by a person who proceeds as soon as possible to make his way to the vehicle, certainly gives him all the rights of a passenger.<sup>2</sup> Where the rules of a carrier require passengers to purchase tickets before entering the vehicle, a person traveling without a ticket, but with no intent to defraud the carrier, is nevertheless a passenger, and entitled to all rights as such,<sup>3</sup> especially if he is upon the train by the express permission of the company's servants, and means to pay his fare.<sup>4</sup> So one who uses a ticket bearing the name of another person, and by its terms not transfer-

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drove on, and the plaintiff fell on his face on the ground. Held, that this was evidence to go to the jury in support of the declaration, as the stopping of the omnibus implied a consent to take plaintiff as a passenger (*Brien v. Bennett*, 8 Carr. & P. 724).

<sup>1</sup> The plaintiff having purchased a through ticket, and having stopped at a way station, afterward got into a caboose car which was attached to a freight train, and on which passengers frequently rode, and the conductor, after discussion with him, concluded that his ticket allowed him to ride in the train, and suffered him to remain. In a suit for an injury received by an accident to the train, it was held, that he must be conclusively presumed to be lawfully on the train (*Edgerton v. N. Y. & Harlem R. Co.*, 35 Barb. 193, 389; affirmed, 39 N. Y. 227). In a suit for personal injury upon defendant's boat, where the question whether the contract between the parties was for the trip of the boat to its destination merely, or included the return trip, was material, the court instructed the jury, that if they believed that plaintiff's agent was authorized to engage plaintiff's passage for the whole trip, and did so, it was immaterial when the fare was paid, provided it was paid when demanded by the officers, or whether part of the fare was paid on the up trip, and part on the down, or all at one time—and also that the suit rested upon an alleged contract for the round trip, and the jury must find such a contract between parties authorized to enter into it, and that it must be binding upon both parties, whether the plaintiff went or not. It was held, that it not appearing that, by the custom of the boat or otherwise, the prepayment of fare was necessary to obligate the defendant to carry passengers the round trip, the instructions were a correct statement of the law governing the liability of the parties, and were properly given (*Russ v. War Eagle*, 14 Iowa, 363).

<sup>2</sup> *Warren v. Fitchburg R. Co.*, 8 Allen, 227. The contract created between a railroad company and a purchaser of one of its tickets, and the rights and liabilities of the parties to such contract, are the same, whether the ticket was purchased at one of the company's stations or at the station of a contiguous railroad, or of any other authorized agent of the company (*Schopman v. Boston & Worcester R. Co.*, 9 Cush. 24).

<sup>3</sup> *Hamilton v. Caledonian R. Co.*, Hay, 260; 19 D. 457.

<sup>4</sup> *Stockdale v. Lancashire & Yorkshire R. Co.* [Exch.], 11 Weekly Rep. 650.

able, is, notwithstanding, entitled to the rights of a passenger, if he was received with a knowledge of the facts, and under circumstances showing that no fraud was intended.<sup>1</sup> The question, whether one is a passenger or not, is one of mixed law and fact; but the law being tolerably clear, it may be said, as a general rule, that the issue, upon any conflict of evidence, is one for a jury to decide, and not one to be passed upon as matter of law by the court.<sup>2</sup>

§ 263. It is well settled that, in the absence of a special contract, a passenger traveling gratuitously has a perfect right of action for injuries suffered by him through the carrier's negligence.<sup>3</sup> And the fact that a traveler who ought to pay has not paid, and does not intend to pay, his fare, does not, in the absence of actual fraud, deprive him of redress for injuries.<sup>4</sup> It is doubtful whether there is even any difference between the degree of care which a

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<sup>1</sup> Great Northern R. Co. v. Harrison, 10 Exch. 376.

<sup>2</sup> Where the testimony is conflicting, the question whether the plaintiff was on the car as a passenger, and was pushed off, or was there without right and dropped off, is one for the jury and not for the court to determine (Meyer v. Second Av. R. Co., 8 Bosw. 305).

<sup>3</sup> Perkins v. N. Y. Central R. Co., 24 N. Y. 196; Nolton v. Western R. Co., 15 N. Y. 444; Great Northern R. Co. v. Harrison, 10 Exch. 376; Philadelphia & Reading R. Co. v. Derby, 14 How. [U. S.] 468; Gillenwater v. Madison &c. R. Co., 5 Ind. 339; Todd v. Old Colony &c. R. Co., 3 Allen, 18; Hunt v. Southern R. Co., 40 Miss. 391. Where a railroad company contracted with the government for a certain sum to carry the mails, and also the mail agent without further charge, it was held that the company was liable to the agent for injuries suffered by him through the negligence of its servants (Collett v. London & Northwestern R. Co., 16 Q. B. 984; Nolton v. Western R. Co., 15 N. Y. 444).

<sup>4</sup> By an English statute, railway companies are bound to carry by certain trains children under three years of age without charge, and are entitled to half the fare charged for an adult in respect of all children between three and twelve years of age. A mother, carrying in her arms a child of three years and two months old, took a ticket for herself by one of these trains, but did not take a ticket for the child. In the course of the journey an accident occurred through the negligence of the company, and the child was injured. At the time his mother took her ticket, no question was asked by the company's servants as to the age of the child, and there was no intention on her part to defraud the company. Held, that the child was entitled to recover against the company for the injury which he had suffered. (Austin v. Great Western R. Co., Law Rep. 2 Q. B. 442).

free passenger has a right to claim, and that to which a paying passenger is entitled. A person who receives a free pass, as part of a transaction beneficial to the carrier (*e. g.*, a drover who receives a pass to travel with cattle on which he pays freight), is not a merely gratuitous passenger.<sup>1</sup>

§ 264. A person who has no lawful right to be upon the vehicle, and is there without the consent of the carrier, cannot recover damages for anything short of gross negligence on the part of the carrier, occurring after the latter has had notice of such person's presence on the vehicle.<sup>2</sup> It has been said in broad terms that he cannot recover for any injury;<sup>3</sup> but this cannot be sustained. Even a trespasser has a right to be protected from a reckless exposure of his life to danger. Where a passenger entered a gravel train, from which the rules of the company excluded all passengers, it was held that if he was notified of the rule, he could not recover for an injury suffered while on the train.<sup>4</sup> So, where a passenger rode on the engine of a train, contrary to a rule of which he was informed, it was held that he had no remedy for injuries.<sup>5</sup> But in

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<sup>1</sup> Bissell v. N. Y. Central R. Co., 25 N. Y. 442; Pennsylvania R. Co. v. Henderson, 51 Penn. St. 315.

<sup>2</sup> Where boys climbed upon the rear car of a freight train, and were killed by it, it was held that the company was not bound to keep a guard for the purpose of driving off trespassers, and that the boys' parents could not recover (*State, use of Coughlin v. Baltimore &c. R. Co.*, 25 Md. 84).

<sup>3</sup> Moss v. Johnson, 22 Ill. 633.

<sup>4</sup> Lawrenceburg &c. R. Co. v. Montgomery, 7 Ind. 474. In that case, the plaintiff had paid his fare, but was told by the engineer, who took it, that the company forbade such trains from receiving passengers.

<sup>5</sup> An action was brought by the plaintiff for injuries incurred through the negligence of the defendants while riding upon an engine upon the defendants' railroad. It appeared that the printed regulations of the defendants prohibited the engineer from allowing the plaintiff, and others not in their employment, to ride on the engine, and that the engineer had informed the plaintiff that it was against the rule to carry him in that way, but nevertheless allowed him to ride. The plaintiff paid no fare. Held, that the presumption was against the right of the plaintiff to be upon the engine, whether he paid fare or rode free. That the *onus* lay with him to show that the engineer had authority to allow him to ride in that place, and that under

neither case was there any evidence of gross or reckless negligence.

§ 265. A common (or other) carrier is not liable for the safety of passengers to the same extent that a common carrier is for the safety of property. He is not bound to insure the safety of passengers, nor responsible for injuries suffered by them from any cause other than his own or his agents' negligence or willful wrong,<sup>1</sup> except, perhaps, in respect to his vehicle, for the soundness of which he is held in New York, if not in other states, to be absolutely responsible.<sup>2</sup>

§ 266. Out of special regard for human life, and acting upon the presumption that every man who commits his person to the charge of others expects from them a higher degree of care for his bodily safety than they would bestow upon the preservation of his property, the law very wisely exacts from a carrier of passengers for hire the utmost care and skill which prudent men are accustomed to use under similar circumstances.<sup>3</sup> This rule has been con-

the circumstances he was a wrong-doer, and could not sustain the action (Robertson v. N. Y. & Erie R. Co., 22 Barb. 91).

<sup>1</sup> Simmons v. New Bedford &c. R. Co., 97 Mass. 361; Readhead v. Midland R. Co., Law Rep. 4 Q. B. 379; Ingalls v. Bills, 9 Metc. 1; McClenaghan v. Brock, 5 Rich. Law, 17; McLane v. Sharpe, 2 Harringt. 481; Stockton v. Frey, 4 Gill, 406; Jeffersonville &c. R. Co. v. Hendrick, 26 Ind. 228; Lamb v. Lyon, Hay, 61; 13 F. C. 799; Anderson v. Pyper, Hay, 23; 2 Mur. 261; Aston v. Heaven, 2 Esp. 533; Christie v. Griggs, 2 Campb. 79; Crofts v. Waterhouse, 3 Bing. 319; 11 J. B. Moore, 133. A railroad company is not liable for an injury to a passenger, caused by the precipitation of a train into a chasm, the bridge over which had been burnt by the public enemy, if the officers in charge of the train had no means of knowing that the bridge had been burnt, and used as much care and diligence as a very prudent and careful man would have exercised, where his own interest and safety were concerned (Sawyer v. Hannibal &c. R. Co., 27 Mo. 240).

<sup>2</sup> See *post*, § 267.

<sup>3</sup> Simmons v. New Bedford &c. Steamb. Co., 97 Mass. 361; McElroy v. Nashua &c. R. Co., 4 Cush. 400. This appears to be in substance the rule laid down in all the decisions; but we give a note of the language used in various cases: "The law imposes upon the carrier of passengers the duty of providing for their safe conveyance, as far as human care and foresight can secure that result" (Bosworth, J., Weed.

stantly applied to the proprietors of stage-coaches<sup>1</sup> and steamboats,<sup>2</sup> and is *a fortiori* applicable to railroad companies,<sup>3</sup> whose mode of conveyance, involving greater dangers, demands unusual care. This doctrine is not to be construed as meaning that the carrier must adopt all the precautions that an ingenious mind could suggest,<sup>4</sup> or have all the skill that science could give,<sup>5</sup> nor that he must use

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*v. Panama R. Co.*, 5 Duer, 193; *Maverick v. Eighth Av. R. Co.*, 36 N. Y. 378; *Brown v. N. Y. Central R. Co.*, 34 N. Y. 404). Common carriers of passengers are bound to use extraordinary care and diligence, and are excused only by force or pure accident (*Caldwell v. Murphy*, 1 Duer, 233; see *Huelsenkamp v. Citizens' R. Co.*, 37 Mo. 537). Common carriers of passengers are bound to use more than ordinary care—*i. e.*, more than such care as is used by very cautious persons; and if a passenger receives an injury which any reasonable care and skill could have prevented, the carrier is liable therefor (*Edwards v. Lord*, 49 Maine, 279). Carriers of passengers for hire are bound to exert the utmost skill and prudence in conveying their passengers, and are responsible for the slightest negligence or want of skillfulness, either in themselves or their servants (*Sales v. Western Stage Co.*, 4 Iowa, 547; *Fairchild v. California Stage Co.*, 13 Cal. 599; *Johnson v. Winona &c. R. Co.*, 11 Minn. 296; see *Jeffersonville &c. R. Co. v. Hendrick*, 26 Ind. 228). The highest degree of care which a reasonable man would use is required of them (*Derwort v. Loomer*, 21 Conn. 245). They must use the utmost care and skill of very cautious persons (*Maverick v. Eighth Av. R. Co.*, 36 N. Y. 378). The care, skill, and diligence required of carriers of passengers are of the highest degree, and must be proportionate to the danger of their particular mode of conveyance, but they are not insurers against all accidents, and the passengers take all the risks incident to the mode of travel (*Galena & Chicago R. Co. v. Fay*, 16 Ill. 538).

<sup>1</sup> Passenger carriers by stage are liable for injuries resulting from even the slightest negligence on the part of themselves or their servants, and they are bound to use the utmost care and diligence of cautious persons to prevent injury to passengers (*Farish v. Reigle*, 11 Gratt. 697. To the same effect are *Maury v. Talmadge*, 2 McLean, 157; *Derwort v. Loomer*, 21 Conn. 245; *Fairchild v. California Stage Co.*, 13 Cal. 599; *Sales v. Western Stage Co.*, 4 Iowa, 547; *Frink v. Coe*, 4 Greene, 555).

<sup>2</sup> *Hall v. Conn. River Steamboat Co.*, 13 Conn. 319.

<sup>3</sup> *Thayer v. St. Louis &c. R. Co.*, 22 Ind. 26; *Chicago, Burlington &c. R. Co. v. George*, 19 Ill. 510; *Galena & Chicago R. Co. v. Yarwood*, 15 Id. 468; *Virginia &c. R. Co. v. Sanger*, 15 Gratt. 230; *Nashville &c. R. Co. v. Messino*, 1 Sneed, 220.

<sup>4</sup> See *Tuller v. Talbot*, 23 Ill. 357.

<sup>5</sup> A railway company is bound to use the best precautions in known practical use to secure the safety of their passengers, but not every possible precaution which the highest scientific skill (according to speculative evidence) might have suggested. And if there are several grounds of negligence suggested, the jury must be satisfied that some one or other of them existed, and caused damage to the party injured, though they need not be able to ascribe the whole injury to either (*Ford v. London & Southwestern R. Co.*, 2 Fost. & F. 730).

all the precautions which, after an accident has happened, it can be seen would have sufficed to avoid it,<sup>1</sup> nor even that he must use such precautions as one would use who knew beforehand that the accident would otherwise certainly occur.<sup>2</sup> But it is the duty of the carrier to adopt all the precautions which have been practically tested, and are known to be of value, and to have all the skill which is possessed by men whose services it would have been practicable for him to secure. Therefore, the mere neglect to adopt new improvements from time to time, as their value is demonstrated, is enough to make the carrier liable for accidents which might have been avoided by the use of such improvements.<sup>3</sup> The carrier is even liable for injuries inflicted by one passenger upon another, if, by the use of ordinary foresight, he could have anticipated and provided against such injuries, or if, by the use of his utmost care and diligence, they could be averted.<sup>4</sup>

§ 267. The rule adopted by the courts in New York, in respect of the liability of passenger carriers, for defects in their vehicles and other means of conveyance, is such as to avoid the necessity of any nice investigations where injuries are caused by such defects. It is held, in that state,

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<sup>1</sup> Bowen v. N. Y. Central R. Co., 18 N. Y. 408.

<sup>2</sup> *Ib.* A railway company had on their platform, standing against a pillar which passengers passed on going to and coming from the trains, a portable weighing-machine, which was used for weighing passengers' baggage, and the foot of which projected out six inches above the level of the platform. It was unfenced, and had stood in the same position, without any accident having occurred to persons passing it, for about five years. The plaintiff being at the station on Christmas day, inquiring for a parcel, was driven by the crowd against the machine, caught his foot in it, and fell over it. Held, that there was no evidence to go to the jury of negligence on the part of the company: the machine being in a situation in which it might have been seen, and the accident not being shown to be one which could have been reasonably anticipated (*Cornman v. Eastern Counties R. Co.*, 4 Hurlst. & N. 781).

<sup>3</sup> Where the defendant neglected to adopt a new and useful improvement in the construction of a switch, and such omission caused the accident, held, that the defendant was liable (*Smith v. N. Y. & Harlem R. Co.*, 19 N. Y. 127).

<sup>4</sup> *Flint v. Norwich & c. Transp. Co.*, 34 Conn. 554; *Pittsburg, Ft. W. & C. R. Co.*, 53 Penn. St. 512; *Simmons v. New Bedford & c. Steamb. Co.*, 97 Mass. 361.

that the carrier is absolutely bound to provide safe vehicles, and is liable for the consequences of defects which make them unfit for the journey, irrespective of any question of negligence.<sup>1</sup> Although this decision was professedly based upon an English case of much earlier date,<sup>2</sup> it has been overruled by the Exchequer Chamber in England, which holds that passenger carriers are not liable for defects in their vehicles which could not have been detected by any degree of care, either in the course of the manufacture of such vehicles, or afterward.<sup>3</sup> In Massachusetts, it has long

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<sup>1</sup> The plaintiff was injured by the breaking of an axle in the car in which he was riding. It was proved that it was caused by a defect in the axle which it would have been impossible to discover without taking the wheel off. Held, that the plaintiff could recover, on the ground that the defendant was bound, absolutely and irrespective of negligence, to provide a road-worthy vehicle (*Alden v. N. Y. Central R. Co.*, 26 N. Y. 102). In an earlier case, it had been held that the defendant was responsible if the defect in the axle could have been discovered in the process of manufacture by the application of any test known to men skilled in such business (*Hegeman v. Western R. Co.*, 13 N. Y. 9).

<sup>2</sup> *Sharp v. Grey*, 9 Bing. 657; S. C., differently reported, 2 Moore & Scott, 620. In that case, all four judges delivered opinions. Alderson, J., in his opinion, said: "A coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterward, and be discovered on investigation." Gaselee and Bosanquet, JJ., expressed themselves more strongly, to the effect that the defendant, a stage proprietor, was absolutely bound to furnish a sufficient vehicle; and the court unanimously refused to disturb a verdict for the plaintiff, although the defect was one which could only have been discovered in the process of manufacture.

<sup>3</sup> This was adjudged in *Readhead v. Midland R. Co.* (Law Rep. 2 Q. B. 412; affirmed, Law Rep. 4 Q. B. 379). In *Stokes v. Eastern Counties R. Co.* (2 Fost. & F. 691), which is mentioned in the last case, the plaintiff's intestate was killed while a passenger on a train, in consequence of the breaking of a tire. The Chief Justice charged the jury that if the flaw was visible, or could have been detected by an ordinary, reasonable, proper, and careful examination by the persons in charge of the engine, the defendant was responsible. Verdict for the defendant. See also *Grote v. Chester & Holyhead R. Co.*, 2 Exch. 255; *Burns v. Cork & Bandon R. Co.*, 13 Irish C. L. 543; *Christie v. Griggs*, 2 Campb. 79; *Israel v. Clark*, 4 Esp. 259; *Bremner v. Williams*, 1 Carr. & P. 414. Although a carrier of passengers does not warrant their safety, or their due arrival at their destination, yet he warrants that the vehicle in which he conveys them is, at the time of the commencement of the journey, free from all defects of construction, and road-worthy, as far as human care and foresight can provide (*Burns v. Cork & Bandon R. Co.*, 13 Irish C. L. 543). A railway company, purchasing rolling stock, even from competent manufacturers, in the due course of business, is responsible for the negligence of those manufacturers in the construction of that stock, to the same extent as it would be in case it was the manufacturer (*Ib.*)

been settled that passenger carriers are not responsible for defects in their vehicles, which it was not in their power to discover.<sup>1</sup> The same doctrine appears to prevail in Scotland.<sup>2</sup> While the New York rule has the merit of simplicity, and relieves passengers from the necessity of meeting an issue upon which they are at a great disadvantage, it is not easy to justify it upon any theory of a contract between the parties. Even under the New York rule, a carrier would not be liable for an accident happening in consequence of a defect in the road, which could not reasonably be foreseen, overstraining his vehicle at a point technically defective, but only in such respect as no reasonable man would think worthy of repair or improvement, if his attention was called to it. The carrier's obligation is only that the vehicle shall be reasonably sufficient for the journey,—not that it shall in every event be safe.<sup>3</sup>

§ 268. Where the courts have declined to follow the stringent rule adopted in New York, they have, nevertheless, generally held the carrier to the duty of extreme care in the selection of his vehicle, and the examination of all its parts. He must certainly do all that any one in his position could do to guard against defects which would render the vehicle unsafe.<sup>4</sup> And the occurrence of an

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<sup>1</sup> *Ingalls v. Bills*, 9 Mete. 1. This case was cited before the courts in New York and England, overruled in the former, and approved in the latter. In that case, a passenger in a coach received an injury solely by reason of the breaking of one of the iron axle-trees, in which there was a very small flaw, entirely surrounded by sound iron a fourth of an inch thick, and which could not be discovered by the most careful examination externally. Held, that the proprietor of the coach was not answerable for the injury thus received.

<sup>2</sup> *Lamb v. Lyon*, Hay, 61; 13 F. C. 799; *Anderson v. Pyper*, Hay, 23; 2 Mur. 261.

<sup>3</sup> Per Blackburn, J., *Readhead v. Midland R. Co.*, Law Rep. 2 Q. B. 412, 441; see *Burges v. Wickham*, 3 Best & S. 669, 693.

<sup>4</sup> In *Ingalls v. Bills* (9 Mete. 1), in the course of an opinion in which all the court concurred, Hubbard, J., said: "Carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care



injury through a defect in the vehicle is at least *prima facie* evidence of negligence on the part of the carrier.<sup>1</sup>

and foresight can guard against; and that if an accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferers, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense." A common carrier of passengers may be liable for injuries arising from the breaking of an axle from the effect of frost, if it appear that he was guilty of even slight neglect in guarding against such effect (*Frink v. Potter*, 17 Ill. 406). Plaintiff was injured while in defendants' cars, in consequence of an imperfection in a driving wheel, causing the wheel to give way. It had been tested in the usual way when new, by hammering it all round, but had not been again tested after a long use of it. The jury found a verdict for plaintiff, and the court supported that verdict (*Manser v. Eastern Counties R. Co.*, 6 Hurlst. & N. 899). The plaintiff was a passenger on a stage-coach belonging to the defendants, and was injured by its overturning in consequence of a defective axle. The evidence showed that the flaw had only the appearance of a hair. In stating the case to the jury, the Lord Commissioner remarked that the question was, "Whether that care, diligence, and attention, which is applicable to the subject, has been used, and whether the defendants have used the utmost care to which human foresight could reach," "You are to say whether there was such appearance of defect as the eye of an artificer, applied with reasonable attention, could discover, and will take into consideration that the eye of an experienced person might discover defects imperceptible to others" (*Anderson v. Pyper*, Hay, 23; 2 Mur. 261). In *Bremner v. Williams* (1 Carr. & P. 414), the judge charged the jury that every stage-coach proprietor impliedly undertakes that his coach shall be sufficiently secure to perform the journeys it undertakes; that he ought to examine its sufficiency previous to each journey; and if he does not, and by the insecurity of the coach a passenger is injured, an action is maintainable against the stage proprietor for negligence, though the coach had been examined previous to the second journey before the accident, and though it had been repaired at the coach-maker's only three or four days before.

<sup>1</sup> The plaintiff, while a passenger in defendants' cars, was injured by reason of the axle of the engine breaking and throwing the train from the track. No evidence was given by the defendants or in their favor. Held, that the defendants were liable, as nothing had appeared to rebut the *prima facie* presumption against them (*Dawson v. Manchester &c. R. Co.*, 5 Law Times [N. S.] 682). Pollock, C. B., said: "Where an accident happens, as in this case, to a passenger in a carriage on a line of railway, either by the carriage breaking down or running off the rails, that is *prima facie* evidence for the jury of negligence on the part of the railway company" (Ib.) In an action against the proprietor of a stage-coach for negligence, whereby the coach broke down, and the plaintiff, traveling by it as a passenger, was hurt, to prove negligence it was held *prima facie* enough to give evidence of the coach having broke down (*Christie v. Griggs*, 2 Campb. 79). Where a coach has broken down

If, however, a carrier simply permits passengers to enter a vehicle notoriously unfit for travel, and not provided by him for passenger traffic, they cannot complain of its defects. Thus, the omission to place a chain across the rear of a caboose car attached to a freight train, and which was not provided for the carriage of passengers, but in which they were allowed to ride, was held not to be negligence on the part of the company.<sup>1</sup>

§ 269. A carrier upon an ordinary road is not responsible for the condition of the road, or for obstacles to travel upon it, because it is not subject to his control, and because, a good road not being an absolutely necessary condition of safe traveling, passengers do not make any express or implied stipulation on the subject. But it is different in the case of a carrier by rail. The condition of the rails and road-bed is a matter of at least equal importance to passengers with the condition of the cars in which they sit. A missing rail is a defect as serious as a broken wheel. There is, therefore, in every contract for the conveyance of a passenger by rail, an implied undertaking for the safe condition of the road as well as of the vehicle, so far at least as the carrier can secure it by care and diligence.<sup>2</sup> Not only must the

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in a manner which makes it reasonably possible to suppose that the accident was caused by overloading, proof that at the time of the accident there were more passengers than the statute allows, is conclusive evidence of negligence (*Israel v. Clark*, 4 Esp. 259).

<sup>1</sup> *Chicago &c. R. Co. v. Hazzard*, 26 Ill. 373.

<sup>2</sup> "A railroad company contract that the road is equipped and run according to the present state of the art. They are liable if the injury might have been avoided by the utmost care and skill on the part of their servants. If the injury occurred by running faster than a prudent, skillful conductor would then have run, or from an obstruction which the conductor saw, or might have seen if he looked in the proper direction, or might have avoided by the use of the most skillful and prompt use of the means in his power, the company would be liable" (*Nashville & Chat. R. Co. v. Messino*, 1 Sneed, 220). A car in which the plaintiff's intestate was riding was thrown from the track by a defective rail. It was proved that the rail

road be properly constructed, but it must be kept in good condition. The servants of the company must examine it frequently, and make sure that the rails are in good order, and firmly secured to the ground. Any failure in these duties is culpable negligence.<sup>1</sup> The obligations of a railroad company with respect to the condition of the accessories to its road, such as bridges, crossways, fences, &c., will be discussed in the chapters on RAILROADS,<sup>2</sup> inasmuch as it owes these duties not only to passengers, but to other persons also, and the whole subject can be more conveniently treated under that heading. But it may be here mentioned that passengers, though they cannot claim the benefit of the statutes concerning railroad fences,<sup>3</sup> are nevertheless entitled to have some precautions adopted which will avoid injury to them from the presence of animals upon the track.<sup>4</sup>

§ 270. The strict rule of liability which is enforced in New York, in relation to carriers' vehicles, is not to be applied to the materials used by a railroad company upon its road-bed. There is but one case in which a recovery has been allowed for damage done by a defective rail, or a rotten bridge, where negligence was not proved or presumed;<sup>5</sup> and that decision is practically overruled.<sup>6</sup>

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was cracked at the time it was laid down, and was under repair at the time of the accident. The jury found that the use of the rail was negligence on the part of the company, and the plaintiff had judgment (*Pym v. Great Northern R. Co.*, 2 Fost. & F. 619).

<sup>1</sup> *Curtiss v. Rochester & Syracuse R. Co.*, 20 Barb. 282; affirmed, 18 N. Y. 534.

<sup>2</sup> See *post*, §§ 444-453, 469.

<sup>3</sup> See *post*, § 469.

<sup>4</sup> *Lackawanna &c. R. Co. v. Chenewith*, 52 Penn. St. 382; *Sullivan v. Phil. & Reading R. Co.*, 30 Id. 234.

<sup>5</sup> *McPadden v. N. Y. Central R. Co.*, 47 Barb. 247.

<sup>6</sup> *Deyo v. N. Y. Central R. Co.*, 34 N. Y. 9.

Great care is required from railroad companies in the construction of their roads, but no absolute liability for defects has ever been charged upon them. A railroad company is certainly not liable for an injury arising from a break in its track, caused by a sudden and extraordinary flood,<sup>1</sup> or by the willful act of a stranger,<sup>2</sup> unless the injury happens to a train which the servants of the company run upon the broken track after they, or those who ought to advise them, have had notice of its condition, or have had sufficient opportunity to learn of it.

§ 271. There can be no doubt of the responsibility of a corporation or individual owning the fee of a railroad, and conveying passengers thereon, for the condition of the road; and as railway companies generally own the fee of the road upon which their business is done, the principle of their liability has been seldom discussed. But the liability of a carrier by railroad for the defects of the road does not depend merely upon his ownership of it. It arises also from the stipulation against such defects which, as we have said, is clearly implied in every contract with a passenger, and also from the policy of the law, which will not allow human life to be jeopardized by a division of the responsibility between the owner of the vehicle and the owner of the road, where (as would surely be the case on railroads) such a division would in a large proportion of cases make it almost impossible to determine which party should make compensation. Therefore, one who conveys

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<sup>1</sup> Where an extraordinary fall of rain had washed away a portion of defendants' track, causing an accident, by which the plaintiff was injured,—held, that defendants were not bound to know the consequences which might ensue from such fall of rain, but only that which could be known by the exercise of ordinary skill and prudence. Held, also, by Bramwell, B., that the existence of the line for five years, running through a marshy country subject to floods, tended to negative negligence on the part of the company in building the line (*Withers v. North Kent R. Co.*, 3 Hurlst. & N. [Amer. ed.] 969; compare *Brehm v. Great Western R. Co.*, 34 Barb. 256).

<sup>2</sup> *Deyo v. N. Y. Central R. Co.*, 34 N. Y. 9

passengers in his own coach, over a railway track belonging to another person or corporation, is liable to his passengers, not only for negligence in the management of the coach,<sup>1</sup> but also for the consequences of negligence in the management of the track, although he may have no control over it.<sup>2</sup> We have no doubt of the correctness of this rule, notwithstanding a decision to the contrary in Vermont.<sup>3</sup> And, on the other hand, a company owning the track, and drawing the cars of another company over it, is also liable to passengers in those cars for negligence, whether in the management of that work or in the maintenance of the track.<sup>4</sup> It has been further held, that where a railroad company grants the use of its track to another company, and an injury happens through the negligence of the latter to a passenger in the cars of the former company, this company is liable to its passenger therefor.<sup>5</sup>

§ 272. A carrier who receives fare from a passenger for a station beyond his own route, is liable for injuries suffered by him at any part of the journey, through the negligence of persons in charge of the means of convey-

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<sup>1</sup> *Fletcher v. Boston &c. R. Co.*, 1 Allen, 9.

<sup>2</sup> *Carpue v. London & Brighton R. Co.*, 3 Railw. Cas. 692; *Rylands v. Peters*, 20 Penn. St. 497; see *Edgerton v. N. Y. & Harlem R. Co.*, 35 Barb. 193, 389; affirmed, 39 N. Y. 227. The owners of passenger cars used upon a railroad belonging to the state, are liable as common carriers for an injury to a passenger occasioned by a collision of their trains, though the motive-power of the road was furnished by the state, and under the control of its agents, through whose negligence the accident happened (*Rylands v. Peters*, 20 Penn. St. 497).

<sup>3</sup> *Sprague v. Smith*, 29 Verm. 421.

<sup>4</sup> A railroad company, receiving upon its track the cars of another company, placing them under the control of its agents and servants, drawing them by its own locomotive over its own road to their place of destination, assumes to the passengers coming upon its road in such cars all the relations of common carriers of passengers, and all the liabilities incident to that relation (*Schopman v. Boston & Worcester R. Co.*, 9 Cush. 24).

<sup>5</sup> *Railroad Co. v. Barron*, 5 Wallace, 90; see *McElroy v. Nashua &c. R. Co.*, 4 Cush. 400.

ance, whether such persons are employed by the original carrier,<sup>1</sup> or by another corporation or individual.<sup>2</sup> The contract in such case is for the entire journey, and the passenger has a right to hold the carrier to whom he paid his fare responsible for his safety through the whole distance. The subsequent carriers are to be deemed agents of the first, so far as the rights of the passenger are concerned. This is, we think, the true rule, and is established in England;<sup>3</sup> but in Vermont, Massachusetts, and Connecticut the opposite rule prevails, and the carrier actually in fault is held to be the only one liable, in the absence of special circumstances.<sup>4</sup> In New York, it seems that either

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<sup>1</sup> This was adjudged in *Birkett v. Whitehaven &c. R. Co.* (4 Hurlst. & N. 730), where the jury having found that there was negligence on the part of defendants' servants, although the accident happened on another company's line, a verdict for the plaintiff was sustained.

<sup>2</sup> The plaintiff purchased a single ticket from the Great Western Railway Co. to a station beyond the end of its line, and upon the road of the South Wales Railway Co. By arrangement between the two companies the expense of working lines, and the fares received from the passengers, are apportioned between them. The plaintiff was conveyed in the same carriage all the way, and after the train had passed along the line of the South Wales Railway Co., it came into collision with a locomotive left on that line by the servants of that company. There was no negligence on the part of the driver of the train. Held, that the Great Western Railway Co. was responsible to the plaintiff, since, under the circumstances, there was an implied contract on its part that it would use reasonable care to maintain the whole line in a condition fit for traffic (*Great Western R. Co. v. Blake*, 7 Hurlst. & N. 987). The same doctrine was reaffirmed in *Buxton v. Northeastern R. Co.*, Law Rep. 3 Q. B. 549; and see *Illinois Central R. Co. v. Copeland*, 24 Ill. 332; *Candee v. Penn. R. Co.*, 21 Wisc. 582; *Wheeler v. San Francisco &c. R. Co.*, 31 Cal. 46.

<sup>3</sup> See cases above cited. The principle was settled, after three appeals, in a case founded upon loss of goods (*Bristol & Exeter R. Co. v. Collins*, 7 H. L. Cas. 194; 5 Hurlst. & N. [Am. ed.] 969; reversing S. C., 1 Hurlst. & N. 517; and affirming S. C., 11 Exch. 790; *Coxon v. Great Western R. Co.*, 5 Hurlst. & N. 274).

<sup>4</sup> *Nutting v. Conn. River R. Co.*, 1 Gray, 502; *Farmers & Mechanics' Bank v. Champlain Transp. Co.*, 23 Verm. 186. The defendants ran their cars, as common carriers, from N. H. to P., which was five miles short of C. They had given public notice, by advertisement, that the cars on their road from N. H. would arrive at P., and the stages leave P. for C. at a specified time. The plaintiff bought of the defendant a through ticket from N. H. to C. The injury complained of happened in the stage between P. and C. The defendants did not own or control the stage, nor participate in the profits of its use. In an action founded on a special contract to carry the plaintiff safely from N. H. to C., by railroad and stage, it was held that

carrier may be held liable;<sup>1</sup> and such is the rule in Mississippi<sup>2</sup> and Georgia.<sup>3</sup>

§ 273. A mere notice on the part of the carrier that he will not be liable for injuries to passengers, even though brought to their knowledge, has no effect upon their rights,<sup>4</sup> unless by some act upon their part, other than merely making the journey under the carrier's charge, they make it the foundation of a special contract. And a common carrier, being under a legal obligation to take all passengers that offer themselves, cannot insist upon their assent to any special contract as a condition of receiving them,<sup>5</sup> nor escape from liability for his negligence, even by an agreement with them, unless such agreement has all the essential elements of a lawful contract, of which the foremost is a consideration. If a passenger pays the usual fare for the usual accommodations, and there is no special consideration shown, his consent to the carrier's restriction of liability is not binding upon him. Nor will carriers be allowed to evade this rule by pretending that their usual fare is reduced by a general usage to make contracts exempting them from

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the advertisement implied no liability of the defendants beyond the line of their road, and the ticket showed only the receipt of so much money paid by the plaintiff, and consequently the undertaking alleged was not proved; therefore a verdict for plaintiff was set aside as against the evidence (*Hood v. N. Y. & N. Haven R. Co.*, 22 Conn. 1).

<sup>1</sup> The contracting carrier has been held responsible (*Cary v. Cleveland & Toledo R. Co.*, 29 Barb. 35; *De Rutte v. Albany & Buffalo Tel. Co.*, 1 Daly, 547; *Buffit v. Troy & Boston R. Co.*, 36 Barb. 420); and so has the carrier actually in fault (*Baldwin v. United States Tel. Co.*, 1 Lans. 125). See this subject further discussed in respect to Telegraph Companies, *post*, § 561.

<sup>2</sup> *Southern Express Co. v. Thornton*, 41 Miss. 216.

<sup>3</sup> *Southern Express Co. v. Shea*, 38 Geo. 519.

<sup>4</sup> So held, even where the notice was printed upon the passenger's ticket (*Rawson v. Penn. R. Co.*, 2 Abb. N. S. 220; *Flinn v. Phil. Wilm. &c. R. Co.*, 1 *Houst.* 469; see *Bissell v. N. Y. Central R. Co.*, 25 N. Y. 442; *Southern Express Co. v. Newby*, 36 Geo. 635).

<sup>5</sup> See *Southern Express Co. v. Moon*, 39 Miss. 822.

liability. A carrier attempting to enforce a special contract against a passenger who paid the same fare as the mass of passengers, would at least have to show that the difference between the rate of fare which would and that which would not deprive him of redress, in case of injury, had been brought under the passenger's notice.

§ 274. There can be no question that a contract exempting a carrier from liability for his own fraud or willful violence would be void, as against public policy. And it may be safely assumed that a contract exempting a carrier of persons from liability for his own negligence would also be held void.<sup>1</sup> But the validity of a contract exempting a carrier of persons from liability for gross negligence *on the part of his servants* has been the subject of much dispute, and the occasion of conflicting decisions. In New York, it has been held, by a divided court, that such a contract, when made in consideration of a total<sup>2</sup> or partial<sup>3</sup> abatement of the usual fare, is valid. In Pennsylvania and Illinois, it is held that such a contract is void, because it tends to cheapen human life, and to remove the most efficient guaranty which the common law has given to society against the destruction of its members by negligence.<sup>4</sup> Our own judgment coincides with the latter

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<sup>1</sup> See *Smith v. N. Y. Central R. Co.*, 24 N. Y. 222, per Smith, J.

<sup>2</sup> So held in the case of a passenger riding upon a free pass, containing a contract to that effect, which he had signed (*Wells v. N. Y. Central R. Co.*, 24 N. Y. 181; *Perkins v. N. Y. Central R. Co.*, Id. 196).

<sup>3</sup> So held where a drover, who paid freight for his cattle, received a free pass for himself to look after his cattle, and was therefore considered to be not strictly a *free* passenger (*Bissell v. N. Y. Central R. Co.*, 25 N. Y. 442, reversing S. C., 29 Barb. 502). This cause was argued three times, the court being equally divided, until after the last argument, when five judges concurred, three still dissenting. To the same effect is the decision in *Boswell v. Hudson River R. Co.* (5 Bosw. 699), a case in the Superior Court of New York city.

<sup>4</sup> *Pennsylvania R. Co. v. Henderson*, 51 Penn. St. 315. That was the case of a drover, paying for the conveyance of his cattle, but having a free pass for himself, with an agreement exonerating the company from liability for negligence. Held, that



decisions. The state has an interest of the highest degree in the preservation of its citizens' lives; and experience demonstrates that there is no practical safeguard against the destruction of those lives by negligence, except in private actions by the persons injured, or their representatives. The protection thus afforded to the individual is, therefore, of such value to the state that it should not allow it to be waived. In England, the subject of contracts between railway companies and their passengers is regulated by a statute, which permits only such contracts as are reasonable.<sup>1</sup> A contract exempting a railway company from liability for the gross negligence of its servants has been held unreasonable, within the meaning of this statute, and therefore void.<sup>2</sup>

§ 275. The carrier must use due care, not only in conveying his passengers upon the journey, but in all preliminary matters, such as their reception into the vehicle, and their accommodation while waiting for it.<sup>3</sup> He is liable for

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the drover was not a free passenger, and that the company remained liable for the gross negligence of its servants. The New York decisions were reviewed and condemned. See also *American Express Co. v. Sands* (55 Penn. St. 140); *Farnham v. Camden &c. R. Co.* (Id. 53). In Illinois, a clearly gratuitous passenger accepted a pass exempting the company from all liability for negligence. Held, that he could recover for *gross* negligence, though not for any lower degree. And *semble*, an exemption from liability for gross negligence would be void (*Illinois Central R. Co. v. Read*, 37 Ill. 484).

<sup>1</sup> Stat. 17 & 18 Vic. c. 31.

<sup>2</sup> *M'Manus v. Lancashire &c. R. Co.*, 4 Hurlst. & N. 327; *Simons v. Great Western R. Co.*, 18 C. B. 805. In New York, it is held that a contract exempting a carrier from liability for his servants' "negligence" includes *gross* negligence (*Bissell v. N. Y. Central R. Co.*, 25 N. Y. 442). The contrary has been adjudged in Illinois (*Illinois Central R. Co. v. Read*, 37 Ill. 484).

<sup>3</sup> If the station-room is full, or if it is intolerably offensive by reason of tobacco smoke, so that a passenger has good reason for not remaining there, it will justify his endeavors to enter the cars at as early a period as possible, and if in so doing he receives an injury from the unsafe and dangerous condition of the platform or steps, in a place where passengers would naturally go, the company are liable therefor, if the passenger used proper care, and violated no rule or regulation of the company of which he had actual knowledge, or which, as a reasonable man, he would be bound to presume existed (*McDonald v. Chicago &c. R. Co.*, 26 Iowa, 124).

any defects or obstacles which, being left by his negligence in the path of a passenger on his way to or from the conveyance, cause an injury to him. This has been so adjudged where the passenger had bought a ticket, but had not entered the train,<sup>1</sup> as well as where the passenger suffered the injury after leaving the vehicle;<sup>2</sup> but we think the rule cannot be confined to these cases. A common carrier, by the very nature of his employment, invites the public to enter upon his vehicles; and he is surely bound to keep the road which he himself provides safe, not only for persons who have made an express contract with him, nor even for those only who enter his premises with the fixed purpose of making such a contract, but also for those who enter in good faith for the purpose of examining his accommodations, or inquiring into his terms, with a view to making the journey, if satisfied on these points. He is liable also for the negligence of himself or his servants in taking passengers aboard his vehicle. Whether bound to render assistance to them for this purpose or not, it is certain that he is liable for the consequences of negligence in giving such assistance, or in giving directions to passengers as to the mode of entering.<sup>3</sup> A railroad company, taking its passengers to or from its station by other means than its railroad, is answerable for any negligence in so doing as much as if the journey were made upon its road.<sup>4</sup>

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<sup>1</sup> Plaintiff had bought a ticket at a station of defendants, where there was a double track, for a train which was to pass on the further track. While crossing the nearer track in order to enter the train, he was struck by another, coming from the opposite direction. Held, that while going from the ticket office to take his seat in the cars, he was to be considered as a passenger, and entitled to all the rights of a passenger, and that it was the duty of the railway company to use the utmost care to provide him with a safe way of access to the train, and to prevent the interposition of any obstacle exposing him to danger, so far as human skill and foresight could guard against it (*Warren v. Fitchburg R. Co.*, 8 Allen, 227).

<sup>2</sup> *Osborn v. Union Ferry Co.*, 53 Barb. 629.

<sup>3</sup> *Drew v. Sixth Av. R. Co.*, 26 N. Y. 49.

<sup>4</sup> A railroad company engaged in the business of carrying their passengers, between a village and their depot, is bound to transport them with ordinary care, and is responsible for neglect thereof (*Buffit v. Troy &c. R. Co.*, 36 Barb. 420).

§ 275 *a*. The responsibility of a common carrier for the safety of passengers ceases after they have been made aware of their arrival at the place of destination, and have had a reasonable time to get off the vehicle.<sup>1</sup>

§ 276. A carrier must allow his passengers a reasonable time in which to get on and off.<sup>2</sup> He is responsible for any injury resulting from the slightest motion of his vehicle during the entrance or exit of a passenger,<sup>3</sup> unless such motion was caused by circumstances over which he had no control, or unless he had no notice of the passenger's movement. But as soon as a passenger has fairly entered the vehicle, the carrier may start, without waiting for him to reach a seat, unless there is some special reason for doing so, as in the case of a weak or lame person, or of a passenger on the outside of a coach. And the ground of the exception must be brought to the carrier's notice, or he will be justified in starting in the usual manner. The carrier must also use prudence in starting, and not set off with a sudden and violent jerk.<sup>4</sup> So, in stopping, he must

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<sup>1</sup> *Imhoff v. Chicago & Mil. R. Co.*, 20 Wisc. 344.

<sup>2</sup> *Fairmount &c. R. Co. v. Stutler*, 54 Penn. St. 375; *Southern R. Co. v. Kendrick*, 40 Miss. 374. As to negligence in ejecting a passenger for lawful cause, see *Sanford v. Eighth Av. R. Co.*, 23 N. Y. 343; *Meyer v. Pacific R. Co.*, 40 Mo. 151.

<sup>3</sup> Plaintiff was a passenger on a city railroad, and wishing to alight, requested the driver to keep on his brake, to which the driver replied, "Yes, sir;" but, while plaintiff was getting off, started the car, by which plaintiff was thrown off and injured. Held, that the company was liable (*Mulhado v. Brooklyn City R. Co.*, 30 N. Y. 370; and see *Nichols v. Sixth Av. R. Co.*, 38 N. Y. 131).

<sup>4</sup> *Lucas v. New Bedford &c. R. Co.*, 6 Gray, 64. The plaintiff, a person of mature years and intelligence, desired to get off at a point at some little distance from the station, and was injured while preparing to leave the rear end of the train, which was running slowly, a jerk, caused by the sudden starting of the engine, having thrown him out through the door. The conductor had suggested to him that business men sometimes got out at that place, and had recommended that he should get out at the rear instead of the front door of the car. But this was held not to be negligence on the part of the conductor, and, upon the whole case, the plaintiff was held to have failed (*Chicago &c. R. Co. v. Hazzard*, 26 Ill. 373). The act of an engineer in letting on more steam than is actually necessary to start a train, which has been stopped too soon before its arrival at the station, by which means the jerking motion of the train

not pull up suddenly, so as to throw passengers off their balance, unless it is positively necessary to do so. A passenger has a right to expect that a train will stop for the usual length of time at a station, and has a right to use such deliberation, in leaving the car, as that time would allow. If, without sufficient notice to the passengers, the train suddenly starts before the usual time has elapsed, a passenger injured thereby may recover damages.<sup>1</sup> The conductor of a train ought to announce the name of each station in time to give passengers a reasonable opportunity to prepare for departure, and must keep the train in waiting, after such announcement, long enough to enable passengers, using due diligence, to leave it safely.<sup>2</sup>

§ 277. A railroad company, using cars, the steps of which are elevated much above the ground, is undoubtedly bound to provide platforms upon which passengers may step, and which are long enough to accommodate all the cars of an ordinary train, so that a passenger in any car may easily reach the platform. And it would seem that when a train is longer than the platform, the conductor is bound, upon the request of any passenger, to move the train backward or forward, so as to enable the passenger to step upon the platform.<sup>3</sup> This is certainly proper in England, where passengers cannot walk through the cars;

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is increased, is not negligence, provided the engineer exercises a reasonable discretion in the matter (Ib.) In *Nichols v. Sixth Av. R. Co.* (38 N. Y. 131), the plaintiff was thrown off by a jerk of the car, and recovered damages.

<sup>1</sup> *Pennsylvania R. Co. v. Kilgore*, 32 Penn. St. 292; *Stockdale v. Lancashire & Yorkshire R. Co.* [Exch.] 11 Weekly Rep. 650; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; and see *Mitchell v. Western R. Co.*, 30 Geo. 22. Where the plaintiffs claimed that the injury alleged resulted from the car's not stopping at the station a reasonable time for the passengers to leave, which was controverted by the defendants, evidence on the part of the plaintiffs to show the usual and customary period of the car's stopping at that place was held admissible (*Fuller v. Naugatuck R. Co.*, 21 Conn. 557).

<sup>2</sup> *Southern R. Co. v. Kendrick*, 40 Miss. 374.

<sup>3</sup> See *Siner v. Great Western R. Co.*, Law Rep. 3 Exch. 150; 4 Id. 117.

but in America, it would probably be held sufficient for the conductor to delay the train until passengers in cars beyond the platform had time to walk through the cars to the platform. One or the other thing he must certainly do. And if he refuses to do either, or if he cannot be found in time to enable the passenger to make the request, the company will be liable for injuries sustained by such passenger in cautiously jumping from the car beyond the platform.<sup>1</sup> But it has been held that the mere fact of the platform being shorter than a particular train, of unusual length, is not evidence of negligence, and that a passenger is not justified in jumping off beyond the platform, upon low ground, unless some such excuse as we have mentioned is shown.<sup>2</sup>

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<sup>1</sup> On the arrival of a train at the railway terminus, there not being room for all the carriages to be drawn up to the platform, some of the passengers were required to alight upon the line beyond it, the depth from the carriage to the ground, about three feet. In so alighting, a lady, instead of availing herself of the two steps, with the assistance of a gentleman, jumped from the first step to the ground, and sustained a spinal injury from the concussion. The jury having found that the company was guilty of negligence in not providing reasonable means of alighting, and that the lady had not by any misconduct on her part contributed to the injury, and having awarded her £500, the court held that there was evidence to warrant their finding, and declined to interfere with the amount of damages (*Foy v. London, Brighton &c. R. Co.*, 18 C. B. [N. S.] 225).

<sup>2</sup> An excursion train, in which the plaintiffs (husband and wife) were passengers to Rhyl, arrived at Rhyl station, and, the train being a long one, the carriage in which they were overshot the platform. It was then daylight. The passengers were not warned to keep their seats, nor was any offer made to back the train to the platform, nor was it, in fact, ever so backed, nor did it move until it started for Bangor. After waiting a short time, the husband, following the example of other passengers, alighted, without any request to the company's servants to back the train, or any communication with them. The wife, standing on the iron step of the carriage, took both his hands and jumped down, and, in so doing, strained her knee. There was a footboard between the iron step and the ground, which she did not use; but there was no evidence of any carelessness or awkwardness in the manner of descent, except such as might be inferred from the above facts. In an action brought for this injury, held, that there was no evidence for the jury of negligence in the defendants; and that the accident was entirely the result of the plaintiffs' own acts (*Siner v. Great Western R. Co.*, Law Rep. 3 Exch. 150; affirmed, Law Rep. 4 Exch. 117). In *Evansville &c. R. Co. v. Duncan* (28 Ind. 441), the plaintiff having jumped off at a dangerous place, and broken her ankle, was not allowed to recover, although there was strong evidence to show that if she had not done as she did, she would have been carried to the next station, some miles further on.

§ 278. The obligation of a carrier to assist passengers in getting on and off, depends largely upon the nature of his vehicle, the facility with which access may be had without assistance, and similar circumstances. Thus, where a ship lies considerably above the level of the pier, and no plank is run ashore, or where she lies at a distance from the shore, the master, if he has undertaken to carry passengers, is bound to hoist them aboard. So a railway company, stopping its train for passengers at a place so steep that they could not easily climb upon the train, would be bound to assist them to do so. But when access is easy, without such aid, as where a guarded plankway is laid from a ship to the pier, or the platform of a railway car is attainable by steps of ordinary length from the ground, assistance cannot be required as of right. A sick or infirm person must ordinarily procure assistance for himself, unless the carrier is accustomed to provide assistants for such purposes, in which case an infirm person has a right to expect that he will be in like manner assisted; and, having set out upon his journey in reliance upon the carrier's custom, he is entitled to its continuance in his favor. How far a passenger may be justified in taking the risk of entering without assistance or convenient accommodation, where none is provided, is an important question, which we shall consider presently, when treating of the contributory fault of passengers.

§ 278 *a*. When a carrier is accustomed to keep up guards or chains until it is safe for passengers to enter or leave the vehicle, they have a right to assume, when the guard is let down, that it is safe for them to proceed; and if, by the carelessness of the carrier or his agents, the guard is let down too soon, and a passenger, relying upon its absence, proceeds, and suffers injury thereby, the carrier is responsible.<sup>1</sup>

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<sup>1</sup> *Ferris v. Union Ferry Co.*, 36 N. Y. 312; and see *Hazman v. Hoboken Land & Co.*, 2 Daly, 130.

§ 278 b. A common carrier must use at least ordinary care to preserve order, and to prevent the commission of violence or of nuisances, on his vehicle. If he has any reason to apprehend that he will be unable to do so, he ought to give timely notice to orderly passengers; and, in default of such notice, he will be liable for any injury suffered by them from the violence even of other passengers.<sup>1</sup>

§ 279. It is the duty of a stage owner, engaged in the transportation of passengers, to have drivers of competent skill, using at least ordinary diligence, and the utmost caution and prudence, and who are well acquainted with the road they travel, and also to furnish well-broken, safe, and steady horses, with harness and coach of sufficient strength, and properly made; and the least failure in any one of these particulars subjects the stage owner to the imputation of negligence, and makes him responsible for the injury or damage arising from such failure.<sup>2</sup> And even after making all this provision, the stage proprietor is still liable for the least carelessness of the driver,<sup>3</sup> not only till

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<sup>1</sup> In a suit by a civilian passenger for damages for injuries inflicted on him by the discharge of a musket dropped on the deck of the steamer by one soldier struggling with another, the defendant is not excused by showing that he was compelled by the government to receive the soldiers on board, and that they were in charge of officers; clearly not, where he afterward voluntarily received the plaintiff on board without notice to him of the enforced presence of the soldiers (*Flint v. Norwich & N. Y. Transportation Co.*, 34 Conn. 554).

<sup>2</sup> *Stockton v. Frey*, 4 Gill, 406; *McKinney v. Neil*, 1 McLean, 540; *Peck v. Neil*, 3 Id. 22; *Frink v. Coe*, 4 Greene, 555; *Sales v. Western Stage Co.*, 4 Iowa, 547; *Derwort v. Loomer*, 21 Conn. 245. Carriers of passengers in stages are bound to provide such good harness, coaches, &c., as will best secure the safety of the passengers (*Farish v. Reigle*, 11 Gratt. 697). If the coach is upset by the horses running off, not through an accidental fright, but because the blocks were out of the brake, causing the stage to run upon them; and if the running of the horses might have been prevented if the horses had been properly harnessed, or if the utmost care and diligence of a cautious person has not been used to secure the blocks in the brake, the proprietors are liable (*Ib.*)

<sup>3</sup> The defendant is liable for the smallest degree of negligence or carelessness in a driver, or for his want of skill (*McKinney v. Neil*, 1 McLean, 540; *Peck v. Neil*,

the coach arrives at its destination, but till the passengers are safely set down.<sup>1</sup> It is the duty of a driver to warn passengers when he is about to pass over a piece of road, bridge, &c., attended with danger, and requiring a change in their position, or any unusual caution on their part.<sup>2</sup>

§ 280. Though it has frequently been said, in the course of judicial decisions, that the mere fact of an injury suffered by a passenger, while on his journey, is sufficient to raise a presumption of negligence on the part of the carrier,<sup>3</sup> yet this is a doctrine altogether too broad to be sustained, and it has been expressly overruled in cases of high authority.<sup>4</sup> It would make the carrier presump-

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3 Id. 22; *Sales v. Western Stage Co.*, 4 Iowa, 547; *Frink v. Coe*, 4 Greene, 555). The proprietors of a mail-coach are answerable for any injury happening to a passenger through the misconduct of their driver (*White v. Boulton, Peake*, 81; and see *Brucker v. Fromont*, 6 T. R. 659; *Jackson v. Tollett*, 2 Starkie, 37). If, in lieu of the regular stage-driver, the superintendent or agent permits another to assume the control of and drive the stage, the proprietors are liable for injuries resulting from that person's incompetence or negligence (*Tuller v. Talbot*, 23 Ill. 357).

<sup>1</sup> *Dudley v. Smith*, 1 Campb. 167.

<sup>2</sup> *Dudley v. Smith*, 1 Campb. 167; *McLean v. Burbank*, 11 Minn. 277; see *Maury v. Talmadge*, 2 McLean, 157.

<sup>3</sup> Per Bell, J., *Laing v. Colder*, 8 Penn. St. 479; *Galena & Chicago Union R. Co. v. Yarwood*, 17 Ill. 509; *Zemp v. Wilmington & Man. R. Co.*, 9 Rich. Law, 84; see *Stokes v. Saltonstall*, 13 Peters, 181; *Christie v. Griggs*, 2 Campb. 79. In an action against a common carrier to recover for personal injuries caused by the overturning of a stage-coach, it was held that the burden of proof was not upon the plaintiff to show negligence on the part of the defendant, but that the law presumed such negligence from the fact of the accident, and required the defendant to rebut such presumption (*Boyce v. California Stage Co.*, 25 Cal. 460).

<sup>4</sup> One of the plaintiffs, while a passenger on the defendant's cars, was struck by something from outside, and her elbow was fractured, no negligence being shown on her part. Held, that the burden of showing negligence at first rests on the plaintiff, that the mere fact of injury while riding in a railroad car does not impose on the company the burden of disproving it, but that the facts attending the injury may raise the presumption of negligence, in which case the *onus* is on the company to show that the injury is not attributable to any fault on its part. Held, further, that while the mere fact of the plaintiff's arm being broken would not suffice to convict the defendant of negligence, the facts that the injury happened while the train was passing another car, and that something grazed a long line on the outside of the car in which the plaintiff sat, were sufficient for this purpose (*Holbrook v. Utica & Schenectady R. Co.*, 12 N. Y. 236. To similar effect, see *Curtis v. Rochester &*



tively liable for injuries which could not rationally be expected to ensue from his negligence, and which were in no way connected with him by any evidence. This would be directly opposed to the practice in other and parallel cases. Nor is there the same reason for allowing such a deviation from the general rule as exists in the case of a carrier of goods. Such a carrier has, in nearly every case, exclusive control over the goods, and all the means of evidence are in his power. A carrier of passengers, on the other hand, has, to say the least, no greater facilities for proving the origin of injuries suffered by them than the passengers themselves have. The law therefore requires, in an action against a carrier upon injuries suffered by a passenger, *prima facie* proof that the proximate cause of such injuries was the want of something which, as a general rule, the carrier was bound to supply, or the presence of something which, as a general rule, the carrier was bound to keep out of the way, under the circumstances of the case so far as they appear. Having established so much, the plaintiff is entitled to recover, without proving affirmatively that the surrounding circumstances were of that ordinary character to which the general rule was meant to apply. Thus, for example, it is a general rule that a railroad company must maintain a good track and road-bed. Proof of a break in the track, by which the cars were thrown off, is therefore sufficient evidence of negligence to put the company upon its defense in an action by a passenger. He is not bound to prove that the weather was such as to make it unlikely that the break was caused by a flood, nor that the company failed to repair the break promptly.<sup>1</sup> So, in general, a rail-

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Syracuse R. Co., 18 N. Y. 534; Brehm v. Great Western R. Co., 34 Barb. 256). The fact that a passenger is run over by a train is not of itself sufficient to raise a presumption of negligence against the carrier (Mitchell v. Western R. Co. 30 Geo. 22).

<sup>1</sup> Defendant's cars ran into a large opening caused by the sliding away of a part of their track in a storm, whereby the plaintiff, a passenger, was injured. Held,

road company is bound to keep its track clear ; and therefore the presence of an animal or other obstruction upon the track, causing an injury to a passenger, is presumptive evidence of negligence.<sup>1</sup> On the same principle, the mere fact of a train having run off the track,<sup>2</sup> or being several hours behind time,<sup>3</sup> is sufficient evidence of negligence. So the overturn of a car or coach,<sup>4</sup> or the coming off of a wheel,<sup>5</sup> is presumptive evidence of negligence, in favor of a passenger injured thereby.<sup>6</sup>

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that the proper instruction to give to the jury in the case was, that " although the mere fact that a person is injured while being transported on a railroad car does not impose upon the railroad company the burden of disproving negligence, yet the presumption of a want of care may arise from circumstances attending the injury ; and whenever such a state of things exists, the *onus* is upon the company to show that the injury did not result from any negligence on its part " (Brehm v. Great Western R. Co., 34 Barb. 256).

<sup>1</sup> Sullivan v. Phil. & Reading R. Co., 30 Penn. St. 234. And it is plainly negligence for an engineer, seeing an obstacle on the track, to run purposely against it, unless that course is clearly dictated by prudence (Willis v. Long Island R. Co., 34 N. Y. 670). The plaintiff, while traveling by the defendants' railway, was injured by the fall of an iron girder, through the negligence of the workmen employed by a contractor in placing it across the retaining walls of the railway. It was proved that the work in question was extremely dangerous, and that it was the practice, when such work was being done across railways, for the company to place a man to signal to the work-people the approach of a train. This precaution was not adopted. Held, sufficient to warrant a jury in finding that the defendants were guilty of negligence (Daniel v. Metropolitan R. Co., Law Rep. 3 C. P. 216 ; reversed on questions of fact, while approving this decision on the law, Id. 591).

<sup>2</sup> Edgerton v. N. Y. & Harlem R. Co., 39 N. Y. 227 ; affirming S. C., 35 Barb. 38 ; Yonge v. Kinney, 28 Geo. 111.

<sup>3</sup> Chicago, Burl. & Quincy R. Co. v. George, 19 Ill. 510.

<sup>4</sup> Fairchild v. California Stage Co., 13 Cal. 599 ; McKinney v. Neil, 1 McLean, 540 ; Farish v. Reigle, 11 Gratt. 697 ; Stockton v. Frey, 4 Gill, 406.

<sup>5</sup> In an action by a passenger against the owners of a stage-coach, he proved that while the coach was driven at a moderate rate, on a good level road, without coming in contact with any other object, one of the wheels came off, whereby it was overturned, and he was hurt. Held, that negligence was inferred from these facts, and the *onus* was on the defendants to rebut this presumption (Ware v. Gray, 11 Pick. 106). A passenger in an omnibus was injured by the bursting of a lamp, and in an action against the owners, it was held that the burden of proof was on them to show affirmatively that the fluid used in the lamp was a safe and proper article (Wilkie v. Bolster, 3 E. D. Smith, 327).

<sup>6</sup> In an action for an injury caused by collision with another train, evidence of the habits and competency of the conductor of the latter train is pertinent (Penn. R. Co. v. Brooks, 57 Penn. St. 339).

§ 280 a. The defendant is of course at liberty to repel the presumption thus raised, by showing either that the injury was not caused by the accident to which it was attributed by the plaintiff, or that the defendant was entirely free from fault in the matter.<sup>1</sup> Thus the presumption of negligence which arises from the fact of a train having run off the track is entirely removed by proof that the displacement of the train was the direct result of the willful act of a stranger ;<sup>2</sup> although the effect of this evidence may be counteracted in turn by showing that the railway company had reason to anticipate danger to its track, and did not take proper precautions against it. When cars come into collision, it is presumed that both are owned and managed by the owners of the railroad ; and this presumption is not removed by evidence that another corporation had power to run cars upon the same road.<sup>3</sup>

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<sup>1</sup> In an action against a railway company for negligence, the fact of the occurrence of an injury not necessarily importing negligence, even if it is *prima facie* proof, is not conclusive proof of negligence (*Bird v. Great Northern R. Co.*, 28 L. J. [Exch.] 3). When the plaintiff has raised against the carrier of passengers the presumption of negligence, it is proper to charge that this presumption can only be rebutted by evidence, on the part of the carrier, that the accident occurred from circumstances against which human prudence and foresight could not guard. This does not mean, that if the jury, looking back at the circumstances of an accident, can see that some course of conduct or precaution would have prevented its occurrence, that the carrier is liable for having failed to pursue that course or omitted that precaution. It is to be deemed as referring to prudence and foresight to be exercised before the accident, and without knowledge that it was about to occur (*Bowen v. N. Y. Central R. Co.*, 18 N. Y. 408).

<sup>2</sup> *Deyo v. N. Y. Central R. Co.*, 34 N. Y. 9 ; *Latch v. Rumnor R. Co.*, 27 L. J. [Exch.] 155.

<sup>3</sup> The plaintiff was a passenger in a train of the defendants', which, while stationary on their railway, was run into by another train. The train in fault was the moving, and not the stationary train. Several railway companies had "running powers" over the part of the defendants' line on which the collision occurred, and no evidence was given as to whether the moving train belonged to or was under the control of the defendants. Held, that in the absence of evidence to the contrary, it must be presumed that the train which caused the accident belonged to, or was under the control of, the defendants (*Ayles v. Southeastern R. Co.*, Law Rep. 3 Exch. 146).

§ 281. It is deemed contributory negligence, within the meaning of the rule on that subject, for a passenger to do any act which unnecessarily exposes him to the risk of such injuries as a traveler is liable to. A passenger cannot, therefore, recover (as a general rule) for an injury to his arm, or other part of his body, while projecting out of the window of a railroad car or a stage.<sup>1</sup> And, by what seems to us an overstrained application of the same principle, it has been held that one who rode on the outside of a stage-sleigh, there being no room for him inside, and he paying his fare like the other passengers, could not recover for an injury suffered from the negligence of the carrier, but which he would not have suffered if he had been inside the sleigh.<sup>2</sup> A passenger who, after due warning, insists upon getting off while a train stops for fuel or water, and not for the egress of passengers, cannot recover for an injury caused by the sudden starting of the train.<sup>3</sup> A railroad passenger getting off before reaching the station platform, without necessity, cannot recover for the strain or other injury which he sustains by leaping off.<sup>4</sup> So, where a railroad

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<sup>1</sup> *Holbrook v. Utica & Schenectady R. Co.*, 12 N. Y. 236; *Indianapolis & C. R. Co. v. Rutherford*, 29 Ind. 82. Evidence of this fact is enough to entitle the defendant to a nonsuit (*Todd v. Old Colony R. Co.*, 7 Allen, 207; *Pittsburg & Connellsville R. Co. v. McClurg*, 56 Penn. St. 294; overruling *New Jersey R. Co. v. Kennard*, 21 Penn. St. 203; and see *Laing v. Colder*, 8 Penn. St. 479). But in *Spencer v. Milwaukee & C. R. Co.* (17 Wis. 487), it was held that such an instruction ought not to be given as matter of law to the jury. Resting an elbow on the *inside* of the window-sill is not contributory negligence, though an injury be suffered partly in consequence thereof (*Winters v. Hannibal & C. R. Co.*, 39 Mo. 468).

<sup>2</sup> *Spooner v. Brooklyn City R. Co.*, 36 Barb. 217; compare *Nichols v. Sixth Av. R. Co.*, 38 N. Y. 131.

<sup>3</sup> *Ohio & Miss. R. Co. v. Schiebe*, 44 Ill. 460.

<sup>4</sup> In an action to recover damages from a railroad company for injuries suffered by the plaintiff in leaving a train on which he had been a passenger, and alleged to have occurred from the negligence of defendants' servants in not stopping the train long enough for him to leave it in safety, held, that if the train had stopped a sufficient time for the plaintiff to have left it upon the platform where passengers usually

company has prepared a platform for the landing of passengers, and a passenger leaves the car on the other side, and is killed by a passing train, the company is not liable, without evidence of some paramount necessity for the act of the passenger.<sup>1</sup> But though it is usual for travelers in horse cars to leave by the rear platform, and to ask the conductor, rather than the driver, to stop the car, yet a passenger is not chargeable with negligence, as matter of law, for adopting the opposite course when more convenient.<sup>2</sup>

§ 282. A passenger ought not to be deemed guilty of contributory negligence when he takes only such risk as, *under the same circumstances*, a prudent man would take. Thus, if cars passed in the same direction every few minutes, a prudent man would allow one to go by, rather than jump on while it was in motion; but if only two or three passed in a day, no man in ordinary health and vigor would hesitate to get on the car while moving at a moderate speed, if the driver refused to stop. And where (as

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land, and had started and passed the platform, and plaintiff then left the platform of the car rather than be carried by, he was guilty of carelessness and could not recover, and that if the train stopped a sufficient time to allow the plaintiff to get off, then the defendants were not guilty of negligence in its management (*Davis v. Chicago &c. R. Co.*, 18 Wisc. 175). Where the plaintiff leaped from the car, at a point four feet from the ground, after she had been warned that it was dangerous, held, that she could not recover for an injury suffered in so doing (*Evansville &c. R. Co. v. Duncan*, 28 Ind. 441). A somewhat similar decision has been made in England (*Sheer v. Great Western R. Co.*, Law Rep. 3 Exch. 150; 4 Id. 117), the substance of which has been heretofore stated in a note to § 277.

<sup>1</sup> *Pennsylvania R. Co. v. Zebe*, 33 Penn. St. 318. So, where the company has provided a way from the platform to the street, without crossing the railroad, a passenger who, crossing the road, is struck by an engine, cannot recover (*Bancroft v. Boston & Worc. R. Co.*, 97 Mass. 275).

<sup>2</sup> In an action to recover damages on account of injuries received from a horse car, it was held that the plaintiff was not chargeable with any fault, in that he did not request the conductor, instead of the driver, to stop the car (*Mulhado v. Brooklyn City R. Co.*, 30 N. Y. 370). It was also held that there was no fault in the attempt of the plaintiff to get off the front platform instead of the rear one, he having got on at the front without objection, and it not appearing that any notice was given to passengers that they must not get off the front platform (*Ib.*)

is frequently the case) the drivers of horse cars constantly refuse to come to a full stop for a male passenger, a prudent man would know that it would be useless to let any car pass for this reason, since he would fare no better if he waited for hours. Under such circumstances, we are decidedly of opinion that the act of getting on a car, while in such moderate motion that a prudent man would not deem the act unsafe, should not be deemed negligent.<sup>1</sup> So, if a ship had no safe means for the entrance of passengers, and its officers either refused to assist a passenger on board, or could not be found, there can be no doubt that the most prudent of men would not hesitate to climb up the side as best he could, rather than lose his voyage. And such being the case, it is absurd to call that negligent which none but a fool would omit to do. So, if a train stops near a station, but without reaching the platform, and the descent from the car to the ground is so precipitate as to injure a passenger, this is not conclusive evidence of his having contributed to his injury by his own fault. If the conductor refused to move the train to the platform, or if the train was so long as to make it impossible to bring all the cars to a proper landing-place, and there was not time to pass through to the cars which stood next to the platform, no sensible man would hesitate to risk a moderate leap, rather than be carried miles away from home.<sup>2</sup> And, if common experience had shown the incivility of the conductor, a prudent passenger would not

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<sup>1</sup> It has been held otherwise as to passengers getting off a car (*Ginnon v. N. Y. & Harlem R. Co.*, 3 Robertson, 25). The doctrine of the text is, however, fully sustained in Indiana (*Evansville &c. R. Co. v. Duncan*, 28 Ind. 441).

<sup>2</sup> In *Foy v. London, Brighton &c. R. Co.* (18 C. B. [N. S.] 225), it appeared that the train was longer than the platform, and that the plaintiff, a lady passenger, was injured by jumping from the step of a rear carriage, as she was advised to do by a porter. The court held that a verdict for the plaintiff could not be set aside. The case of *Siner v. Great Western R. Co.* (Law Rep. 3 Exch. 150; 4 Id. 117), though it limits the effect of this decision, is not inconsistent with it.

waste time in asking favors of him. In all these and similar cases, a passenger might directly contribute to his own injury, and yet act prudently in taking the risk. He ought not, therefore, to be precluded from recovering damages in such cases. An act of a passenger in obedience to the directions of the person in charge of the vehicle (such as the driver of a stage or the conductor of a train) cannot be deemed negligent,<sup>1</sup> unless so palpably opposed to common prudence as to make it a clear act of folly. Where a passenger laid his hand upon the inside of a car door, and it was crushed by the sudden closing of the door, it was held that his act was not necessarily so negligent as to deprive him of all claim for damages.<sup>2</sup> It

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<sup>1</sup> See *McIntyre v. N. Y. Central R. Co.*, 37 N. Y. 287; affirming S. C., 43 Barb. 532. A railroad company cannot allege that a passenger is in fault in obeying specific instructions of the conductor, instead of general directions of which he has been informed (*Pennsylvania R. Co. v. McCloskey*, 23 Penn. St. 526; see also *Foy v. London, Brighton & C. R. Co.*, 18 C. B. [N. S.] 225). But mere *advice* to get off, under circumstances which made it clearly imprudent to do so—*e. g.*, while the car was moving rapidly—does not bind the company (*Ginnon v. N. Y. & Harlem R. Co.*, 3 Robertson, 25).

<sup>2</sup> The plaintiff, while getting into one of the defendants' railway carriages, having a parcel in his right hand, placed his left hand on the back of the open door to aid him in mounting the step. Before he had completely entered the carriage, the guard, without any previous warning, forcibly closed the door, and crushed the plaintiff's hand between the door and the door-post. In an action for the injury thus sustained, held, by Byles and Keating, JJ., that the jury were justified in finding in favor of the plaintiff, that the guard was guilty of negligence, and that there was no evidence of contributory negligence on the part of the plaintiff. Held, by Montague Smith, J., that by putting his hand in the position he did, knowing that the door was about to be closed, the plaintiff was guilty of negligence which contributed to the injury, and therefore was not entitled to recover (*Fordham v. London, Brighton & C. R. Co.*, Law Rep. 3 C. P. 368). A boy twelve years of age had entered a third-class railway carriage at night time, and was about to seat himself, when he placed his fingers on a part of the door. His father was behind him, getting into the carriage, when a porter violently closed the door, which crushed the boy's fingers, and struck his father on the back. Held, that there was evidence of negligence on the part of the porter, which was properly submitted to the jury, and that there was no contributory negligence on the part of the boy (*Colman v. So. Eastern R. Co.*, 4 Hurlst. & C. 699). Where, however, a similar accident happened to a passenger who kept his hand on the door-post for some time after he entered the carriage, the guard having called out to passengers to take their seats, it was held that he could not recover (*Richardson v. Metropolitan R. Co.*, 37 Law Jour. [C. P.] 176).

has been frequently adjudged that a passenger who, under reasonable apprehension of a collision or other accident, changes his position to one in fact more dangerous, or even leaps from the vehicle while in motion, is not guilty of negligence, if the act was one which a reasonable man, under similar circumstances, might probably have done.<sup>1</sup> The law does not require of passengers the exercise, in imminent peril, of all the presence of mind and care of a prudent man; but the circumstances will be left to the jury to say from them whether the party acted rashly and under undue apprehension of danger.<sup>2</sup> Finally, as a passenger is only bound to use ordinary care, he is not to blame for not foreseeing events which are not common in the business, as generally carried on, even though they are common in the business of the particular carrier with

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<sup>1</sup> Plaintiff was a passenger on the defendants' cars, and seeing another train approaching at such speed as rendered a collision inevitable, jumped from his seat, and attempted to escape from the car; and while he was on the platform the collision occurred, and he was seriously injured. Held, that plaintiff was not guilty of negligence, and that his being on the platform at the time of the injury was not a riding on it, in the sense contemplated in the statute (*Buel v. N. Y. Central R. Co.*, 31 N. Y. 314). A passenger on a stage-coach may, in case of accident arising from neglect of the carrier, and, in the exercise of reasonable discretion, leap from it to save himself, and maintain an action against the carrier for injuries occasioned by such leap (*Frink v. Potter*, 17 Ill. 406). If a passenger in a coach, by reason of a peril arising from an accident for which the proprietors thereof are liable, is in so dangerous a situation as to render his leaping from the coach an act of reasonable precaution, and he leaps therefrom, and thereby breaks a limb, the proprietors are answerable to him in damages, though he might safely have retained his seat (*Ingalls v. Bliss*, 9 Metc. 1; *Jones v. Boyce*, 1 Starkie, 493). In an action against a railroad company for injuries sustained in jumping from a car while moving rapidly, it is sufficient to aver that, by and through the negligence, unskillfulness, and default of the company's servants, in conducting and managing the car, and for the want of due care and attention to their duty, it became and was unfit for the plaintiff to remain in the car, and his life and limbs were then and there greatly jeopardized and endangered, and in order to get out of such danger, and to preserve his life and limbs, he was obliged to jump from the car, whereby he was greatly hurt, wounded, &c., without alleging specifically the circumstances which rendered it unsafe and dangerous to remain in the car, or by what means or how his life and limbs were endangered (*Eldridge v. Long Island R. Co.*, 1 Sandf. 89).

<sup>2</sup> *Galena & Chicago R. Co. v. Yarwood*, 17 Ill. 509.



whom he has to do.<sup>1</sup> Much less is he to blame for not foreseeing and taking precautions against a collision or other accident.<sup>2</sup>

§ 283. Getting on or off a vehicle while in motion is a familiar instance of negligence in the plaintiff, almost always fatal to a recovery for an injury sustained in part from the negligence of the carrier at the same time.<sup>3</sup> There are, however, cases in which such an act may be excused, as being upon the whole prudent under the particular circumstances. Thus, if the motion of a car were not very rapid, and the conductor directed, or even advised, a passenger to get on or off without stopping the car, the latter would have a right to rely upon this advice.<sup>4</sup> The mere fact that the conductor of a train prematurely announces its arrival at a station does not at all justify a passenger, destined for that station, in jumping off before the train stops;<sup>5</sup> and even where a passenger is carried beyond his proper station, by the fault of the company, he cannot recover for an injury suffered by him in leaping from the train while in rapid motion.<sup>6</sup> But a passenger is

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<sup>1</sup> Plaintiff was in the waiting-room of a city railroad, waiting to be taken to her destination. Seeing a car coming in, she went out to enter it, and the car then being transferred from one track to another, sideways, by means of a movable slide, her foot was caught in the slide, and she was badly injured. Held, that there was no want of care on her part, as she could not be expected to anticipate a sideway movement of the car (*Gordon v. Grand St. & Newtown R. Co.*, 40 Barb. 546).

<sup>2</sup> *Willis v. Long Island R. Co.*, 32 Barb. 398; affirmed, 34 N. Y. 670. Asking for a delay of the train is not contributory negligence, even though a collision ensues which would not have happened but for such delay (*Flinn v. Philadelphia & C. R. Co.*, 1 Houston, 469).

<sup>3</sup> *Lucas v. Taunton & C. R. Co.* 6 Gray, 64; see *Nichols v. Sixth Av. R. Co.*, 38 N. Y. 131.

<sup>4</sup> See *McIntyre v. N. Y. Central R. Co.*, 37 N. Y. 287; 43 Barb. 532, on a similar point; and see this point further discussed in § 282.

<sup>5</sup> *Pennsylvania R. Co. v. Aspell*, 23 Penn. St. 147.

<sup>6</sup> So held, in the case of horse cars (*Mettlestadt v. Ninth Av. R. Co.*, 4 Robertson, 377; 32 How. Pr. 428; *Ginnon v. N. Y. & Harlem R. Co.*, 3 Robertson, 25). If a passenger, by the negligence of the agents of the railroad company, is carried beyond the station where he has a right to be let off, he can recover for the inconvenience,

not in fault for merely starting from his seat, and getting ready to leave the car in the usual manner, as soon as he has reason to expect that it will stop, even though it does not stop, and he is exposed to danger by his position.<sup>1</sup>

§ 284. There is in every carrier's vehicle some place which is not intended for the use of passengers, or which is intended for their use only when getting in or out. This is particularly the case in railroad trains, which usually have a baggage car not intended for the personal use of passengers, and platforms and steps attached to each car, which are designed merely as facilities for entrance and departure. It is generally provided by statute that a railroad company shall not be liable for accidents happening to passengers while on a baggage car or a platform, provided seats are furnished for all passengers on the train, and a notice of the rule is conspicuously posted up in each car.<sup>2</sup> The requirements of these statutes must be strictly complied with in order to enable a railroad company to avail itself of their protection. If the requisite notices are not properly posted,<sup>3</sup> or if there are no vacant seats in the car,<sup>4</sup> a passenger's rights are unaffected by the statute. Where

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loss of time, and labor of traveling back; but if he leaps off without waiting for the train to stop, he does it at his own risk (*Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; *Jeffersonville R. Co. v. Swift*, Id. 459). So held, where a passenger leaped in the dark from a train going seven to ten miles an hour (*Pennsylvania R. Co. v. Aspell*, 23 Penn. St. 147).

<sup>1</sup> *Nichols v. Sixth Av. R. Co.*, 38 N. Y. 131.

<sup>2</sup> N. Y. Stat. of 1850, ch. 140, § 40.

<sup>3</sup> Where an injury is inflicted on a passenger directly and solely by a collision, if the notices specified in § 40, ch. 140, of Laws of 1850, are not at the time posted up as prescribed by that act, the injured party may recover, even though he be in the baggage car, if there with the knowledge of, and without objection from, the conductor (per *Bosworth, J.*, *Carroll v. N. Y. & New Haven R. Co.*, 1 Duer, 571, 579).

<sup>4</sup> *Clark v. Eighth Av. R. Co.*, 36 N. Y. 135; affirming S. C., 32 Barb. 657; *Willis v. Long Island R. Co.*, 34 N. Y. 670; affirming S. C., 32 Barb. 398.

the statute requires the notice to be posted *inside* the car, a notice posted on the *outside* has no effect, unless it is proved to have come to the actual notice of the passenger against whom it is to be enforced.<sup>1</sup> The fact that the passenger is aware of the terms of the statute is immaterial, for it confers no privilege upon railroad companies, except upon the conditions mentioned, and the non-performance of those conditions is sufficient evidence that the statute does not apply. And although there are seats actually unoccupied by passengers, yet if they are filled up with baskets, bags, or other things, or are improperly covered by passengers with their clothes, a passenger is at liberty to retire to the platform, so far as the statute is concerned. It is the duty of the conductor to provide seats without being asked to do so.<sup>2</sup> When the provisions of the statute have been complied with, a railroad company does not waive the benefit of the statute by taking the fare of a passenger standing upon a prohibited place.<sup>3</sup>

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<sup>1</sup> The New York statute on this subject will not prevent a recovery by a passenger injured while standing on the platform, where the car is full inside, and the only notice not to occupy the platform is posted *outside* of the car, and is not shown to have come to his knowledge (*Clark v. Eighth Av. R. Co.*, 32 Barb. 657; affirmed, 36 N. Y. 135).

<sup>2</sup> Plaintiff and his son were passengers on defendant's train. They got on the cars after they had started, and not finding a seat in the first car, remained standing on the platform, where the conductor took their fares; and the car afterward ran off the track, seriously injuring them. They found in the car several persons occupying two seats, and several instances where people had placed luggage on the seats. Held, that if there were accommodations in the cars for plaintiff, he could not recover; but that he was not bound to go from one car to another while the train was in motion to find a seat; also, that he was not bound to remove luggage from seats, or to apply to passengers or the conductor to do it; and that defendant was liable (*Willis v. Long Island R. Co.*, 32 Barb. 398).

<sup>3</sup> Plaintiff, while standing on the platform of defendant's car, the proper notices being posted up, and there being sufficient accommodation inside the car, was injured in consequence of a collision occurring. Held, that the fact of the conductor's knowing that he was on the platform, and not objecting, would not justify the presumption that the company consented to waive its rights in that respect (*Higgins v. N. Y. & Harlem R. Co.*, 2 Bosw. 131).

§ 284 a. Apart from these statutes, a railroad company has no right to accuse a passenger of negligence in taking a seat in any car apparently designed for passengers, unless the conductor requests him to take another car.<sup>1</sup> And even though a passenger refuses to comply with such a request from the conductor, he is not thereby debarred from recovering for an injury, unless it appears at least probable that he would not have suffered the injury if he had complied.<sup>2</sup> Passengers are not bound to select one car, or place in a car, in preference to another, upon the ground that one would be safer than the other in case of a collision or other accident.<sup>3</sup> Nor is it (at

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<sup>1</sup> Plaintiff was riding in the post-office apartment of the baggage car, without objection from the conductor or any servant or agent of the company, when a collision occurred by which he was injured. Held, that the fact of his being in the baggage car, when in case of a collision the other cars would have been safer, would not constitute contributory negligence, if he was lawfully there (*Carroll v. N. Y. & New Haven R. Co.*, 1 Duer, 571). Where plaintiff took a ticket for a certain place, and after stopping on the way, having received a check from the conductor, resumed his journey in another train, in an inferior class of car attached to a freight train, but where the conductor recognized the check previously given him, and where passengers were allowed to ride, and while there sustained injuries by reason of an accident occurring,—held, that the defendant was liable, and that plaintiff was not guilty of negligence in getting into that car to ride (*Edgerton v. N. Y. & Harlem R. Co.*, 35 Barb. 193; affirmed, 39 N. Y. 227). Held, also, that the railroad company was estopped from saying that the caboose car was so evidently dangerous that it was negligence on the part of the passenger to ride therein (*Ib.*) Where the rules of the company forbade passengers to ride in the baggage car, but a laborer had for two months daily sat in that car, being too dirty from his work to make his presence in the other cars agreeable, and the conductor having made no objection,—held, that the laborer could recover for an injury suffered in that case (*O'Donnell v. Allegheny Valley R. Co.*, 59 Penn. St. 239).

<sup>2</sup> *Lawrenceburg &c. R. Co. v. Montgomery*, 7 Ind. 474. The plaintiff, while a passenger in a stage-coach, was injured by the overturning of the coach. He had been requested by the agent of the coach to take an inside seat, but had refused, and was informed that if he kept the outside seat he must do it at his own risk. Held, that this would not exonerate the carrier from liability, the accident having occurred by the negligence of the driver, and the position of the plaintiff in no way contributing to it (*Keith v. Pinkham*, 43 Maine, 591).

<sup>3</sup> *Carroll v. N. Y. & New Haven R. Co.*, 1 Duer, 571, 579; *Willis v. Long Island R. Co.*, 32 Barb. 398; affirmed, 34 N. Y. 670. Where it was the custom of the defendant to direct passengers to enter certain cars at starting, but no notice was posted up of such direction, and plaintiff, stepping into another car where he could

common law) necessarily negligent for a passenger to ride upon the platform of a car.<sup>1</sup> It certainly is not improper for him to do so if he cannot get a seat inside, and he would probably be justified in doing so if any nuisance were allowed inside the car, such, for example, as drunken or obscene passengers, or quarreling, or even smoking, if it were offensive to him. Taking a seat on the top of a stage, with the consent of the driver, there being seats provided on the top, is not negligence on the part of a passenger.<sup>2</sup>

§ 285. It has been held that a passenger on a railroad train, who leaves the car in which he started, and enters another, without good cause, cannot recover for injuries suffered in the latter car, which he would not have sustained if he had remained where he was at starting.<sup>3</sup> This seems to us an unreasonable rule, unless very great liberality is used in determining what causes are sufficient to justify a change from one car to another. A passenger has a right to presume that all the cars are equally safe; and he ought not to be restricted to any one, except while the train is actually moving. On a long journey, the mere desire of change, and the relief which a little variety gives

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not get a seat, was injured by the collision of that car with another,—held, not contributory negligence in the plaintiff (*Pollard v. N. Y. & N. Haven R. Co.*, 7 Bosw. 437).

<sup>1</sup> The court cannot say, on a bill of exceptions, that riding on the outside platform of a horse-railroad car is such a want of ordinary care as to prevent a recovery for an injury sustained by being thrown therefrom (*Meesel v. Lynn & C. R. Co.*, 8 Allen, 234; *Willis v. Long Island R. Co.*, 32 Barb. 398; affirmed, 34 N. Y. 670; *Clark v. Eighth Av. R. Co.*, 32 Barb. 657; affirmed, 36 N. Y. 135; *Colegrove v. N. Y. & Harlem R. Co.*, 6 Duer, 382; affirmed, 20 N. Y. 492. Where the deceased knew that he was violating a rule of the company by riding on a platform,—held, that there could be no recovery for his death (*McAunich v. Mississippi & C. R. Co.*, 20 Iowa, 338).

<sup>2</sup> *Caldwell v. Murphy*, 1 Duer, 233; and see *Keith v. Pinkham*, 43 Maine, 501, before cited.

<sup>3</sup> *Galena & Chicago R. Co. v. Fay*, 16 Ill. 558, 562, 570; *Gal. & C. R. Co. v. Yarwood*, 15 Id. 468; *S. C.*, 17 Id. 509; see *Gilligan v. N. Y. & Harlem R. Co.*, 1 E. D. Smith, 453; *Lovett v. Salem & C. R. Co.*, 9 Allen, 557.

to the monotony of travel, will often lead to a change of cars, and should be sufficient reason for it. However this may be, it is certain that the inability of a passenger to obtain a seat in the car which he first enters, is sufficient reason for his leaving it for another. Moving from one car to another, while the train is in motion, is generally evidence of gross negligence ; and a case of urgent necessity must be shown, to justify it. But if a passenger does so in obedience to a direction or request of the officer in charge of the train or car, the act may be deemed consistent with proper care, since passengers have a right to rely upon the judgment of the officers of the train in respect to such matters, and are bound to obey the reasonable directions of such officers.<sup>1</sup>

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<sup>1</sup> Plaintiff's intestate was a passenger on the defendant's cars, and could not find a seat. After the cars had started, an officer of the train came in and ordered the standing passengers to pass forward, saying that there were plenty of seats forward. In stepping from the platform of one car to another, the intestate slipped and fell between the cars and was instantly killed. Held, that she was not so clearly guilty of negligence as to warrant the taking of the case from the jury (*McIntyre v. N. Y. Central R. Co.*, 43 Barb. 532 ; affirmed, 37 N. Y. 287).

## CHAPTER XVI.

### CLERKS AND OTHER RECORDING OFFICERS.

Sec. 286. General rule of liability.

• 287. Illustrations of the rule.

288. Liability for false certificates, and mistakes in searches.

289. Liability of towns for negligence of their clerks.

§ 286. Clerks of courts, of counties and towns, prothonotaries, registers of deeds, and other like officers, belong to that class of ministerial officers to which we have referred on a previous page.<sup>1</sup> Their duties are prescribed in general terms by the statute, and, in some of the states, a penalty is affixed to breaches of official duty by them. In many of the states, as in New York,<sup>2</sup> they are expressly declared to be liable for all damages resulting from their errors and mistakes in certain designated duties. But independently of the statute, they are liable in damages to any one who is specially injured by their omission to perform, or their negligent performance of, a duty imposed. They are liable not only for their personal default or negligence, but also for that of their deputies within the ordinary course of their business.<sup>3</sup>

§ 287. The reported cases which illustrate and apply the foregoing rule of liability to this class of officers are few in number, and without circumstances of novelty. A

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<sup>1</sup> *Ante*, §§ 156, 166, 184.

<sup>2</sup> See § 288, *post*.

<sup>3</sup> *Welldes v. Edsell*, 2 McLean, 366. The deputy is responsible for his acts to the clerk alone, and not to third parties (*McNutt v. Livingston*, 7 Smedes & M. 641; *Snedicor v. Davis*, 17 Ala. [N. S.] 472). See the chapter on SHERIFFS, *infra*, § 519.

number of these cases turn upon the liability of clerks for negligence in taking or certifying as to the sufficiency of bonds. Thus the clerk of a court is liable to one damaged by his failure to require security for costs in a proper case, on issuing a writ,<sup>1</sup> or by his accepting a bond with insufficient sureties, where it is his duty to inquire into their sufficiency,<sup>2</sup> or by his approving an appeal bond which provides an insufficient penalty.<sup>3</sup> So he would be liable for refusing or neglecting to issue a writ in a proper case. And when a clerk refused to issue citation, on the demand of the plaintiff, though informed that the cause of action would be barred by prescription within a short period unless interrupted by service of citation, he was held liable for the amount of the debt after prescription was accomplished.<sup>4</sup> So it has been held that a clerk of a court is liable for neglecting to enter a cause on the docket, whereby the plaintiff in the action lost the opportunity of obtaining judgment until a subsequent term, the defendant in the action having in the meantime become insolvent.<sup>5</sup> But a clerk is not liable for omitting to do an act which the law does not require of him.<sup>6</sup>

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<sup>1</sup> Wright v. Wheeler, 8 Ired. [N. C.] Law, 184.

<sup>2</sup> McNutt v. Livingston, 7 Smedes & M. 641. See Bevens v. Ramsey, 15 How. [U. S.] 179; Snedcor v. Davis, 17 Ala. [N. S.] 472; Governor v. Wiley, 14 Id. 172. In the last case, the sureties of the clerk were held liable on their bond. In Ohio, it has been held that issuing letters of guardianship, before the guardian has filed his bond, is not such a breach of official duty as to charge the clerk's sureties (State v. Sloane, 20 Ohio, 327).

<sup>3</sup> See Billings v. Lafferty, 31 Ill. 318.

<sup>4</sup> Anderson v. Joliett, 14 La. Ann. 614.

<sup>5</sup> Brown v. Lester, 13 Smedes & M. 392. Sharkey, J., said: "Whatever is a duty required by law is covered by the condition of the bond [to faithfully perform the duties of the office]; and a failure to discharge a duty which is required is a breach of the bond, for which the injured party may recover damages commensurate to the injury."

<sup>6</sup> In England, a clerk of a county court is not liable for not preparing, or for negligently preparing, a notice to defendant of an order against him, which order was made by the judge at the time of delivering judgment, and formed a part of the judg-



§ 288. A clerk of a court is liable for falsely certifying to the court or to the sheriff that a valid bond has been given, by reason of which the lien of a judgment<sup>1</sup> or attachment<sup>2</sup> is lost. A clerk is liable, like a commissioner of deeds or a notary, for mistakes in his certificate of an acknowledgment of an instrument.<sup>3</sup> A clerk who undertakes to search the records of his office is liable for any mistake in his certificate of the same to the damage of another. Thus, if he certifies to a purchaser of land that there are no liens of judgments or mortgages on the same, when in fact there is one, he is liable to such purchaser.<sup>4</sup> A clerk

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ment, and not requiring service (*Robinson v. Gell*, 12 C. B. 191). Where a clerk of a court refused to issue more than one execution on a judgment, and the statute was silent as to the number of executions which might be issued, held, that he was not liable for a breach of his official duty (*State v. Ruland*, 12 Mo. 264).

<sup>1</sup> A judgment debtor, for the purpose of superseding the judgment against him, pending an appeal, tendered to the clerk sufficient security. The clerk allowed the bond to be signed in blank, with the understanding that he might afterward fill it up, but before it was filled up, the sureties revoked the authority. The clerk, however, at the instance of counsel, filled up the bond, and certified it to the court as a valid bond. The judgment having been affirmed, and the sureties become bound by the judgment, the latter filed a bill against the judgment creditor and the clerk, and obtained a decree for a perpetual injunction. Held, in an action by the judgment creditor against the clerk, that the latter was liable for the amount of the original judgment, with interest, and for the expenses of defending the injunction suit (*Williams v. Hart*, 17 Ala. [N. S.] 102).

<sup>2</sup> *Work v. Hoffnagle*, 1 Yates, 506.

<sup>3</sup> See *Barnes v. Smith*, 3 Humph. 82. In that case, the clerk omitted to state in his certificate of acknowledgment of a mortgage, that he was personally acquainted with the mortgagor, as required by statute. The court held that the original certificate, and not a copy, was the only competent evidence to prove the delinquency, and, that not being produced, a verdict for the defendant was sustained.

<sup>4</sup> *McCaraher v. Commonwealth*, 5 Watts & S. 21; *Zeigler v. Commonwealth*, 12 Penn. St. 227. And it is immaterial in such a case that there was no proof of a fee paid for the search (*Ib.*) In New York, the statute provides that the county clerk shall have a sufficient number of competent searchers in his office, shall cause searches, when ordered, to be made without delay, shall certify to the correctness of his searches, and shall be held legally liable for all damages resulting from errors, inaccuracies, or mistakes in his return. In *Kimball v. Connolly* (3 Keyes [N. Y.] 57), in the New York Court of Appeals, the plaintiff's testator, desiring to obtain a loan upon her house and lot, caused a search to be made by the county clerk for liens upon the premises. The clerk in his return, omitted to state a judgment for about twenty-seven dollars recovered against a previous owner, and which was a lien on the premises. The plaintiff's intestate obtained the loan, which was more than sufficient to

having received a deed for record, and entered upon it "received for record," is bound to record it. If he suffers it to go out of his hands unrecorded, he is liable to any one who is thereby damaged.<sup>1</sup>

§ 289. In Vermont, the several towns are made liable by statute for the neglect and default of their clerks. Under this statute, it has been held that, it being the duty of town clerks to index their records of deeds, &c., the town is liable to one injured by the clerk's neglect to provide such an index.<sup>2</sup> And in a case where a proposed purchaser of real property inquired of the clerk whether there was any incumbrance of record upon the land, and requested to be shown the record, if there was, but the clerk refused to show the record, and knowing the fact of the incumbrance, concealed the same, both the clerk and the town were held liable.<sup>3</sup> But the town will not be liable for the mere refusal of the clerk to refer to a particular record, when the record was open to the inspection of the applicant, and he neglected to examine it for himself. The false representations of the clerk concerning the records will not excuse a person for not making an examination of them. The town is not liable for the verbal representations of the clerk.<sup>4</sup>

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pay off all the incumbrances on the property, including the omitted judgment. The judgment creditor afterward sold the premises on execution, and bought them in for sixty dollars, they being worth about six thousand dollars. By a compromise arrangement, he conveyed the premises to the plaintiff, as executor, &c., of the deceased owner, for four hundred dollars. The plaintiff sued the county clerk for the loss sustained by the estate. Held, that as the loss sustained was directly caused by the non-payment of the judgment, and not by the clerk's negligence, the latter was not liable.

<sup>1</sup> Welles v. Hutchinson, 2 Root, 85.

<sup>2</sup> Hunter v. Windsor, 24 Verm. 327. But to enable a party to sue for such neglect, it must appear that the neglect to keep such an alphabet or index was the cause of the damages he has sustained (Ib.; Lyman v. Edgerton, 29 Verm. 305).

<sup>3</sup> Lyman v. Windsor, 24 Verm. 575.

<sup>4</sup> Lyman v. Edgerton, 29 Verm. 305.

## CHAPTER XVII.

### INJURIES CAUSING DEATH.

- SEC. 290. No remedy at common law for injuries causing death.  
291. The statutory remedy.  
292. The English statute.  
293. The statutes of New York and other states.  
294. The statutes of Massachusetts and other states.  
295. The statutes of Pennsylvania and other states.  
296. Territorial operation of these statutes.  
297. For whose benefit suit may be brought.  
298. Illegitimate child.  
299. Pecuniary injury, how far essential to action.  
300. Instantaneous death.  
301. Effect of settlement with the deceased.  
302. Contributory fault.

§ 290. The common law allowed of no remedy, by way of a civil action, for the death of a human being.<sup>1</sup> Obviously, the deceased person never could have had a cause of action for his own death ; therefore none could survive to his legal representatives, even if the law had allowed, as in fact it did not allow, a cause of action for an injury to the person to survive him. The husband or master of the deceased was not allowed to sue, because the only damage recognized by the law was the loss of service during the lifetime of the servant, and the death of the servant, therefore, worked no injury to the master of which the law could take notice. And, if the act causing death amounted to a felony, the general rule of the common law, forbidding any civil suit upon a felony, would alone have sufficed to exclude a claim for damages. What-

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<sup>1</sup> A private *criminal* action was allowed, in cases of murder. The last instance of this kind was the famous case of *Ashford v. Thornton* (1 Barn. & Ald. 405), in which the defendant insisted upon his right to trial by battle. The right of action was soon afterward taken away by statute.

ever may be said of the logic of these arguments, it is certain that the conclusions thus reached formed a settled doctrine of the common law. No one, whether as executor, master, parent, husband, wife, or child, or in any other right or capacity whatsoever, could maintain an action for damages on account of the death of a human being.<sup>1</sup>

§ 291. The multiplication of fatal accidents in later times, and the practical impossibility of securing the punishment of mere carelessness by means of criminal proceedings, induced the British legislature to interfere; and, by the statute known as "Lord Campbell's Act," passed in 1846, a remedy by civil action was given to the personal representative of every person killed by the fault of another, and leaving a parent, husband, wife, or child. This statute has been in substance incorporated into the legislation of most states of the American Union, the

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<sup>1</sup> The earliest reported decision upon this point was in an action for the battery of the plaintiff's wife, "whereby she died." It was held that the right of action was merged in the felony (*Higgins v. Butcher*, Yelv. 89; 1 Brownl. & G. 205). The first reported case of negligence in which the question arose was before Lord Ellenborough (*Baker v. Bolton*, 1 Campb. 493), who instructed the jury that the plaintiff, who sued for the loss of his wife's services, could only recover for his loss during her lifetime, although her death was caused by the defendant's negligence. All the decisions in cases where an executor or administrator sought to maintain the action have been one way (*Whitford v. Panama R. Co.*, 23 N. Y. 465; affirming S. C., 3 Bosw. 67; *Crowley v. Panama R. Co.*, 30 Barb. 90; *Beach v. Bay State Steamboat Co.*, 30 Barb. 438; *Mahler v. Norwich & C. Transportation Co.*, 45 Barb. 226). But an attempt was made to distinguish between this claim and the claim for loss of service, which seems to have been successful in two instances, one an action brought by a father for the loss of his son (*Ford v. Monroe*, 20 Wend. 210), and the other brought by a husband for the loss of his wife (see *Lynch v. Davis*, 12 How. Pr. 323). But in these cases the legal question does not appear to have been argued; and, in well-considered cases, it has been uniformly and unanimously adjudged that a husband cannot sue for the death of his wife (*Green v. Hudson River R. Co.*, 2 Keyes [N. Y.] 294; affirming S. C., 28 Barb. 9; *Lucas v. N. Y. Central R. Co.*, 21 Barb. 245; *Eden v. Lexington & C. R. Co.*, 14 B. Monr. 204), nor a wife for the loss of her husband (*Carey v. Berkshire R. Co.*, 1 Cush. 475; *Palfrey v. Portland & C. R. Co.*, 4 Allen, 55; *Wyatt v. Williams*, 43 N. H. 102), nor a parent for the loss of his child (*Carey v. Berkshire R. Co.*, 1 Cush. 475). Neither can any one maintain an action for any indirect loss which he sustains by the death of another person, such, for example, as the loss which an insurer of the life sustains by that event (*Conn. Life Ins. Co. v. N. Y. & New Haven R. Co.*, 25 Conn. 265).

points of difference being only in relation to the persons for whose benefit the action may be brought, the form of action (which in some cases is by indictment), and the measure of damages, which last point will be fully considered in our chapter on DAMAGES.

§ 292. The English statute is 'as follows: "Whosoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person, who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."<sup>1</sup> "Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom, and for whose benefit, such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, in such shares as the jury, by their verdict, shall find and direct."<sup>2</sup> By a subsequent statute, passed in 1864, it is

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<sup>1</sup> 9 & 10 Vict. c. xciii. § 1.

<sup>2</sup> 9 & 10 Vict. c. xciii. § 2. It is also provided that "Every such action shall be commenced within twelve calendar months after the death of such deceased person" (Ib. § 3). Section five of the same statute provides as follows: "The following words and expressions are intended to have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject-matter, that is to say: Words denoting the singular number are to be understood to apply also to a plurality of persons or things; and words denot-

provided that, "If and so often as it shall happen, at any time or times hereafter, in any of the cases intended and provided for by the said act, that there shall be no executor or administrator of the person deceased, or that, there being such executor or administrator, no such action as in the act mentioned, shall, within six calendar months after the death of such deceased person as therein mentioned, have been brought by and in the name of his or her executor or administrator, then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by and in the name of such executor or administrator; and every action so to be brought shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure, as nearly as may be, as if it were brought by and in the name of such executor or administrator." <sup>1</sup>

§ 293. The statute of New York on this subject is as follows: "Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default, is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof, then and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." <sup>2</sup>

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ing the masculine gender are to be understood to apply also to persons of the feminine gender; and the word "person" shall apply to bodies politic and corporate; and the word "parent" shall include father and mother, and grandfather and grandmother, and step-father and step-mother; and the word "child" shall include son and daughter, and grandson and granddaughter, and step-son and step-daughter."

<sup>1</sup> 27 & 28 Vict. c. cxv. § 1.

<sup>2</sup> N. Y. Stat. of 1847, ch. 450, § 1.

“Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, provided, that every such action shall be commenced within two years after the death of such person.”<sup>1</sup> The statutes of Vermont, New Jersey, North Carolina, Ohio, Illinois, Indiana, Michigan, Wisconsin, California and Oregon, are substantially the same.<sup>2</sup> The statute of Missouri differs only

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<sup>1</sup> N. Y. Stat. 1847, ch. 450, § 2, as amended by Stat. 1849, ch. 256, § 1.

<sup>2</sup> Vermont. “Whenever the death of a person shall hereafter be caused by the wrongful act, neglect, or default of any person, either natural or artificial, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person or corporation who would have been liable to such action if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as shall amount in law to a felony” (Verm. Gen. Stat. 1863, ch. 52, § 15). “Every such action shall be brought in the name of the personal representatives of such deceased person; and the amount recovered in such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, who shall receive the same proportions as provided by law for the distribution of the personal estate of persons dying intestate” (Id. § 16).

New Jersey. “Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony” (Nixon’s Dig. 1868, p. 234, § 1). “Every such action shall be brought by and in the names of the personal representatives of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and

upon the question of damages. Nor are the statutes of Minnesota, Kansas, Alabama or Mississippi, very different, except on that point.

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next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person: *Provided*, that every such action shall be commenced within twelve calendar months after the death of such deceased person" (Id. § 2).

North Carolina. "Whenever the death of a person shall be caused by the negligence or default of any railroad or steamboat company, or of any steamboat or stage-coach proprietor, in this state, and the neglect or default is such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured" (N. Car. Rev. Code, 1855, p. 65, ch. 1, § 8). "Whenever the death of a person shall be caused by the wrongful act of another person, and the wrongful act is such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony" (Id. § 9). "Every such action shall be brought by and in the name of the personal representative of the deceased, and the amount recovered shall be disposed of according to the statute for the distribution of personal property in case of intestacy. And in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death: *Provided*, that every such action shall be commenced within one year from the death of such deceased person" (Id. § 10). "The amount recovered in every such action shall be for the exclusive and sole benefit of the widow and issue of the deceased, in all cases where they are surviving" (Id. § 11).

Ohio. "Whenever the death of a person shall be caused by wrongful act, neglect, or default; and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof; then and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree or manslaughter" (Ohio Rev. Stat. 1860, p. 1139, chap. 87, § 636). "Every such action shall be brought by and in the name of the personal representatives of such deceased person; and the amount recovered in every such action, shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal estates, left by persons dying intestate; and in every such action, the jury may give such damages as they shall deem fair and just, not exceeding five thousand dollars, with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person: *Provided*, that every such action shall be commenced within two years after the death of such deceased person" (Id. § 637).

Illinois. "Whenever the death of a person shall be caused by wrongful act, neg-



§ 294. The statute of Massachusetts provides a peculiar and limited remedy. It enacts "that if the life of

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lect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony" (1 Ill. Rev. St. 1858, p. 422, § 1). "Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars: *Provided*, that every such action shall be commenced within two years after the death of such person" (Id. § 2).

Indiana. "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter, for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed five thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased" (2 Ind. Rev. Stat. [Gavin & Hord], 1862, 330, § 784; see *Evansville & C. R. Co. v. Lowdermilk*, 15 Ind. 120).

Michigan. "Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages, in respect thereof, then and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under circumstances as amount in law to felony" (Mich. Rev. Stat. 1857, p. 1329, ch. 151, § 1). "Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death, to the wife and next of kin of such deceased person" (Id. § 2).

Wisconsin. "Whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages

any person, being a passenger, is lost by reason of the negligence or carelessness of the proprietor or proprietors

in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured" (Wisc. Rev. Stat. 1858, p. 800, ch. 135, § 12). "Every such action shall be brought by and in the name of the personal representative of such deceased person; and the amount recovered shall belong and be paid over to the husband or widow of such deceased person, if such relative survive him or her; but if no husband or widow survive the deceased, the amount recovered shall be paid over to his or her lineal descendants, and to his or her lineal ancestors, in default of such descendants; and in every such action the jury may give such damages, not exceeding five thousand dollars, as they shall deem fair and just in reference to the pecuniary injury resulting from such death to the relatives of the deceased specified in this section: *Provided*, every such action shall be commenced within two years after the death of such deceased person" (Id. § 13).

California. "Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony" (Cal. Gen. Stat. 1862, p. 447, ch. 330, § 1). "Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin, in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages, pecuniary and exemplary, as they shall deem fair and just, and may take into consideration the pecuniary injury resulting from such death to the wife and next of kin of such deceased person: *Provided*, that every such action shall be commenced within two years after the death of such deceased person" (Id. § 3).

Oregon. "When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury caused by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed five thousand dollars, and the amount recovered, if any, shall be administered as other personal property of the deceased person" (Oregon Code, 1862, p. 97, § 367).

Missouri. "Whenever the death of a person shall be caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured" (Missouri Gen. Stat. 1865, p. 601, ch. 147, § 3). "All damages accruing under the

of any steamboat, stage-coach, or of common carriers of passengers, or by the negligence or carelessness of their

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second section shall be sued for and recovered, first, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or, third, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor, and in every such action the jury may give such damages as they may deem fair and just, not exceeding five thousand dollars, with reference to the necessary injury resulting from such death to the surviving parties who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect, or default" (Id. §§ 2, 4).

Minnesota. "When death is caused by the wrongful act or omission of any party, the personal representatives of the deceased may maintain an action, if he might have maintained an action, had he lived, for an injury caused by the same act or omission; but the action shall be commenced within two years after the act or omission, by which the death was caused; the damages thereon cannot exceed five thousand dollars, and the amount recovered is to be for the exclusive benefit of the widow and next of kin, to be distributed to them in the same proportions as the personal property of the deceased person" (Minnesota Rev. Stat. 1866, p. 546, ch. 77, § 2).

Kansas. "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased" (Kansas Gen. Stat. 1868, p. 709, ch. 80, § 422).

Alabama. "When the death of a person is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action against the latter at any time within one year thereafter, if the former could have maintained an action against the latter for the same act or omission, had it failed to produce death" (Alabama Rev. Code, 1867, § 2297). "The damages recovered in such action cannot exceed three years' income of the deceased, and in no case exceed three thousand dollars. The amount recovered is for the benefit of the widow; if there be none, then for the benefit of the child or children; if there be none, then to be distributed as other personal property amongst the next kin of the deceased" (Id. § 2298).

Mississippi. "Whenever the death of any person shall be caused by any such wrongful or negligent act or omission as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof, and such deceased person shall have left a widow or children, or both, or husband or father, the person or corporation, or both, that would have been liable if death had not ensued, and the personal representatives of such person, shall be liable for the damages, notwithstanding the death; and the action may be brought in the name of the widow for the death of her husband, or by the husband for the death of his wife, or by the parent for the death of a child, or in the name of a child for

servants or agents, such proprietor or proprietors and common carriers shall be punished by fine not exceeding five thousand nor less than five hundred dollars, to be recovered by indictment, and paid to the executor or administrator, for the use of the widow and children of the deceased, in equal moieties; but if there are no children, to the use of the widow; and if no widow, to the use of the next of kin.”<sup>1</sup> The same provision<sup>2</sup> in substance has been enacted

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the death of an only parent; the damages to be for the use of such widow, husband, or child, except that in case a widow should have children, the damages shall be distributed as personal property of the husband” (Miss. Rev. Code, 1857, p. 486, § 48).

<sup>1</sup> Mass. Gen. Stat. 1860, p. 794, ch. 160, § 34.

<sup>2</sup> Maine. “Any railroad corporation by whose negligence or carelessness, or by that of its servants or agents while employed in its business, the life of any person, in the exercise of due care and diligence, is lost, forfeits not less than five hundred nor more than five thousand dollars, to be recovered by indictment found within one year, wholly to the use of his widow, if no children; and to the children, if no widow; if both, to her and them equally; if neither, to his heirs” (Me. Rev. Stat. 1857, p. 370, ch. 51, § 42). These provisions are by another section made applicable to steamboats, stage-coaches, and common carriers (Id. p. 376, ch. 52, § 7).

New Hampshire. “If the life of any person not in their employment shall be lost by reason of the negligence or carelessness of the proprietors of any railroad, or by the unfitness or gross negligence or carelessness of their servants or agents, in this state, such proprietors shall be fined not exceeding five thousand dollars, nor less than five hundred dollars, and one-half such fine shall go to the widow, and the other half to the children of the deceased. If there is no child, the whole shall go to the widow; and if no widow, to his heirs according to the law regulating the distribution of intestate estates” (N. H. Gen. Stat. 1867, p. 529, ch. 264, § 14).

Connecticut. “If the life of any person, being a passenger, or crossing upon a public highway in the exercise of reasonable care, shall be lost by reason of the negligence or carelessness of any railroad company in this state, or by the unfitness or negligence or carelessness of its servants or agents, such railroad company shall be liable to pay damages not exceeding five thousand dollars nor less than one thousand dollars, to the use of the executor or administrator, in an action on the case upon this statute, for the benefit of the husband or widow and heirs of the deceased person, one moiety thereof to go to the husband or widow, and the other to the children of the deceased; but if there shall be no children, the whole shall go to the husband or widow; and if there is no husband or widow, to the heirs according to the law regulating the distribution of intestate personal estate” (Conn. Rev. Stat. 1866, p. 202, ch. 7, § 544).

Rhode Island. “If the life of any person, being a passenger in any stage-coach or other conveyance, when used by common carriers, or the life of any person, whether a passenger or not, in the care of proprietors of, or common carriers by means of, railroad or steamboats, or the life of any person crossing upon a public highway with

in Maine, New Hampshire, Connecticut, and Rhode Island. The statute of Texas also provides but a limited remedy.<sup>1</sup>

§ 295. In Pennsylvania, the statute provides that "whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the injured party during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned."<sup>2</sup> In that state the remedy is limited to the husband, widow, children, or parents of

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reasonable care, shall be lost by reason of the negligence or carelessness of their servants or agents, in this state, such common carriers, proprietor or proprietors, shall be liable to damages for the injury caused by the loss of life by such person, to be recovered by action on the case, for the benefit of the husband or widow and next of kin of the deceased person, one moiety thereof to go to the husband or widow, and the other to go to the children of the deceased" (R. I. Rev. Stat. 1857, p. 427, ch. 176, § 16). "If in such case there shall be no children, the whole of such damages shall go to the husband or widow; and if no husband or widow, to the next of kin, according to the law of this state regulating the distribution of intestate personal estate amongst the next of kin" (Id. § 17).

<sup>1</sup> "If the life of any person is lost by reason of the negligence or carelessness of the proprietor or proprietors, owner, charterer, or hirer of any railroad, steamboat, stage-coach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, gross negligence, or carelessness of their servants or agents; and whensoever the death of a person may be caused by wrongful act, neglect, unskillfulness, or default; and the act, neglect, unskillfulness, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action for such injury, then and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony" (Paschal's Dig. 1866, p. 98, art. 15, § 1). "Every such action shall be for the sole and exclusive benefit of the surviving husband, wife, child or children, and parents of the person whose death shall have been so caused, and may be brought by such entitled parties, or any of them; and if said parties fail for three calendar months to institute suit, then it shall be the duty of the executor or administrator of the deceased, unless specially requested by all of said parties entitled not to prosecute the same. And in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death; and the amount so recovered shall be divided among the person or persons entitled under this act, or such of them as shall then be alive, in such shares as the jury shall find and direct, and shall not be liable for the debts of the deceased" (Id. § 2). "Such action is to be brought within a year after the death of such deceased" (Id. § 3).

<sup>2</sup> Purdon's Penn. Dig. 1862, p. 754, § 2.

the deceased.<sup>1</sup> In Maryland,<sup>2</sup> the action must be brought in the name of the state, for the use of the person entitled to damages, who must be either the wife, husband, parent, or child of the deceased. In Georgia, "a widow, or if no widow, a child or children, may recover for the homicide of the husband or parent; and if the suit be brought by the widow or children, and the former or one of the latter dies pending the action, the same shall survive in the first case to the children, and in the latter case to the surviving child or children."<sup>3</sup> In Louisiana,<sup>4</sup> only the widow and minor children, or in default of these, the surviving father and mother of the deceased, have a right of action for damages caused by the death. In Ken-

<sup>1</sup> "The persons entitled to recover damages for an injury causing death shall be the husband, widow, children, or parents of the deceased, and no other relative; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors" (Purdon's Pennsylvania Dig. 1862, p. 754, § 3). Under this statute, a mother (being a widow) may maintain an action (Pennsylvania R. Co. v. Bantom, 54 Penn. St. 495).

<sup>2</sup> "Whenever the death of a person shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death shall have been caused under such circumstances as amount in law to felony" (Maryland Code, 1860, p. 449, art. 65, § 1). "Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the State of Maryland, for the use of the person entitled to damages, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided among the above-mentioned parties in such shares as the jury by their verdict shall find and direct" (Id. § 2). Section 4 defines the word person so as to include corporations.

<sup>3</sup> Georgia Code, 1868, § 2920.

<sup>4</sup> "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. The right of this action shall survive, in case of death, in favor of the minor children and widow of the deceased, or either of them, and in default of these, in favor of the surviving father and mother, or either of them, for the space of one year from the death" (Louisiana Rev. Stat. 1857, p. 79, § 18).

tucky, "the widow and minor child or children (or either or any of them) of a person killed by the careless, or wanton, or malicious use of firearms or other deadly weapons, not in self-defense, may have an action against the person or persons who committed the killing, and all others aiding or promoting the killing, or any one or more of them, for reparation of the injury; and in such action the jury may give vindictive damages."<sup>1</sup> In Iowa, "a father, or in case of his death, or imprisonment, or desertion of his family, the mother, may prosecute as plaintiff an action for the expenses and actual loss of service resulting from the injury or death of a minor child."<sup>2</sup> And another statute is construed so as to afford a remedy in all cases of death by negligence.<sup>3</sup> In Tennessee, "the action may be instituted by the personal representatives of the deceased; but if he decline it, the widow and children of the deceased may, without the consent of the representative, use his name in bringing and prosecuting the suit, on giving bond and security for costs, or in the form prescribed for paupers."<sup>4</sup> In Virginia, no remedy for injuries causing death has been provided by statute.<sup>5</sup>

§ 296. The operation of these statutes is limited to the territory of the states which have enacted them. No action can be maintained upon one of these statutes if the deceased person received the fatal injury at a place not

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<sup>1</sup> Gen. Laws of Kentucky, 1866, App. p. 681.

<sup>2</sup> Iowa Rev. Stat. 1860, p. 492, ch. 117, § 2792.

<sup>3</sup> *Donaldson v. Mississippi &c. R. Co.*, 18 Iowa, 280.

<sup>4</sup> Tenn. Rev. Stat. 1858, p. 457, ch. 2, art. 15, § 229.

<sup>5</sup> In Arkansas, the only statute on the subject is as follows: "For wrongs done to the person or property of another, an action may be maintainable against the wrongdoers, and such action may be brought by the person injured, or after his death by his executor or administrator, against such wrong-doer, or after his death against his executor or administrator, in the same manner and with like effect in all respects as actions founded on contracts" (Ark. Stat. 1858, p. 120, ch. 4, § 94).

within the limits of the state by which such statute was enacted, whether such place be in another state,<sup>1</sup> or upon the high seas.<sup>2</sup> It makes no difference in this respect that both parties to the injury were citizens of the state by which the statute was enacted, or that the wrong-doer was a corporation chartered by that state,<sup>3</sup> or that the negligence causing the injury was a breach of a contract entered into in that state.<sup>4</sup> And it has been held, in Massachusetts, that no action will lie upon such a statute outside of the state enacting it.<sup>5</sup>

§ 297. These statutes are not designed for the benefit of creditors of the deceased. By providing, as nearly all these statutes do, for a particular distribution of the recovery, creditors are excluded.<sup>6</sup> The persons for whose benefit the recovery is to be had have a vested right in such recovery from the moment of the death; and if they die before judgment is had, their heirs take its benefits.<sup>7</sup> The action cannot be maintained at all under the statutes of England or New York, or any similar ones, unless the deceased left at least one surviving relative of the class specified in the statute.<sup>8</sup> Where, as in New York, Vermont, New Jersey, North Carolina, Ohio, Illinois, Michigan, and California, the statute uses the conjunctive

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<sup>1</sup> *Whitford v. Panama R. Co.*, 23 N. Y. 465; affirming S. C., 3 Bosw. 57; *Crowley v. Panama R. Co.*, 30 Barb. 90; *Beach v. Bay State Steamboat Co.*, 30 Barb. 433; 10 Abb. Pr. 71; reversing S. C., 27 Barb. 248; 6 Abb. Pr. 415; *Vanderwerken v. N. Y. & N. Haven R. Co.*, 6 Abb. Pr. 239.

<sup>2</sup> *Mahler v. Norwich &c. Transportation Co.*, 30 How. Pr. 237.

<sup>3</sup> *Whitford v. Panama R. Co.*, 23 N. Y. 465; 3 Bosw. 57; *Crowley v. Panama R. Co.*, 30 Barb. 90.

<sup>4</sup> *Ib.*

<sup>5</sup> *Richardson v. N. Y. Central R. Co.*, 98 Mass. 85.

<sup>6</sup> *Chicago v. Major*, 18 Ill. 349.

<sup>7</sup> *Waldo v. Goodsell*, 33 Conn. 432.

<sup>8</sup> *Safford v. Drew*, 3 Duer, 627; *Lucas v. N. Y. Central R. Co.*, 21 Parb. 245; *Chicago &c. R. Co. v. Morris*, 26 Ill. 400; see *Andrews v. Hartford & New Haven R. Co.*, 34 Conn. 57.



form, and allows an action for the benefit of "a widow *and* next of kin," the action can be sustained where there is a widow but no kindred of the deceased,<sup>1</sup> or where he leaves kindred but no widow.<sup>2</sup> In Vermont, New Jersey, Ohio, Illinois, Michigan, and California, the statute mentions only widows and next of kin as entitled to its benefits. A husband, not being, as such, of kin to his wife, is therefore not within the benefit of the statute; and the action cannot be maintained if the deceased left a husband only.<sup>3</sup> Such was the law in New York until April, 1870, when an act was passed including husbands among the beneficiaries of the statute.

§ 298. Where, as in England, Maine, New Hampshire, Massachusetts, Maryland, Pennsylvania, Louisiana, Georgia, Alabama, Missouri, and Kansas, the statute specifies the "child" of the deceased, an illegitimate child is not within the description;<sup>4</sup> but in Ohio, where the statute gives the recovery to the "next of kin," and another statute makes an illegitimate child heir to its mother, if the latter leaves no lawful child, an illegitimate child so left is entitled to the benefit of the statute.<sup>5</sup> And the statute being the same in New York,<sup>6</sup> we have no doubt that the same decision will be made there whenever the

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<sup>1</sup> See *Oldfield v. N. Y. & Harlem R. Co.*, 14 N. Y. 310.

<sup>2</sup> *Oldfield v. N. Y. & Harlem R. Co.*, 14 N. Y. 310; *Quin v. Moore*, 15 N. Y. 432; *Tilley v. Hudson River R. Co.*, 24 N. Y. 471; *McMahon v. Mayor &c. of New York*, 33 N. Y. 642; *Lyons v. Cleveland &c. R. Co.*, 7 Ohio St. 336; *Chicago v. Major*, 18 Ill. 349.

<sup>3</sup> *Lucas v. N. Y. Central R. Co.*, 21 Barb. 245; see *Dickins v. N. Y. Central R. Co.*, 23 N. Y. 158.

<sup>4</sup> An illegitimate child is not within the 9 & 10 Vict. c. 93, giving a right of action for the benefit of the wife, husband, parent, or child of a person whose death has been caused by wrongful act, neglect, or default (*Dickinson v. Northeastern R. Co.*, 2 Hurlst. & C. 735).

<sup>5</sup> *Muhl v. Southern &c. R. Co.*, 10 Ohio St. 272.

<sup>6</sup> N. Y. Stat. 1855, ch. 547.

case arises, inasmuch as the reasoning appears to us conclusive.

§ 299. Although the statutes of New York, and of most other states, upon this subject, are substantially like that of England, they have not been construed with entire uniformity. In England, it is held that pecuniary injury to some one of the relatives of the deceased, specified in the statute, is an indispensable element of the cause of action, and that without evidence of such injury, the action is not maintainable, even for nominal damages; indeed, nominal damages in such an action are deemed inadmissible.<sup>1</sup> In New York, however (the words of the statute upon this point being exactly the same as in the English statute), it is held that such evidence is not at all essential to the cause of action, and that nominal damages at least are recoverable in every case of death by a wrongful act or default.<sup>2</sup> And this seems to be the view taken by the courts in Pennsylvania<sup>3</sup> and Ohio.<sup>4</sup> It follows, as a matter of course, that the action can be sustained without showing that any of the relatives for whose benefit the action is brought were dependent upon the decedent for support,<sup>5</sup> and although

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<sup>1</sup> Duckworth v. Johnson, 4 Hurlst. & N. 653.

<sup>2</sup> Oldfield v. N. Y. & Harlem R. Co., 14 N. Y. 310; Quin v. Moore, 15 N. Y. 432.

<sup>3</sup> Pennsylvania R. Co. v. Ogier, 35 Penn. St. 60.

<sup>4</sup> In Lyons v. Cleveland & Toledo R. Co. (7 Ohio St. 336), this doctrine was approved. In that case, however, the question presented was not quite so broad. The complaint set forth the names of the next of kin, and averred that they had sustained \$5,000 damages. This was demurred to, on the ground that it was not shown how the kindred were damaged, nor whether their damage was really pecuniary. The demurrer was overruled.

<sup>5</sup> Keller v. N. Y. Central R. Co., 17 How. Pr. 102; affirmed in the New York Court of Appeals (24 Id. 172). The same opinion precisely is reported *sub nom.* Dickens v. N. Y. Central R. Co., 28 Barb. 41. The judgment in the latter case was reversed on a different ground (Dickens v. N. Y. Central R. Co., 23 N. Y. 158). This proposition was necessarily involved in the decision of Quin v. Moore (15 N. Y. 432), and Oldfield v. Harlem R. Co. (14 N. Y. 310). The same decision has been made in other states (Chicago v. Major, 18 Ill. 349).

the decedent left neither widow nor children. It is not necessary, even in England, to show that the relatives have lost by the death something to which they had a legal title. The action is maintainable, if they had a reasonable expectation of an advantage from the continuance of the life of the deceased, capable of appreciation in pecuniary values.<sup>1</sup> And as the English statute contemplates the injury to individuals, rather than to a class, an action may be maintained where the death causes a pecuniary loss to one or more of the relatives, even though it should cause a gain to the others equal to or exceeding the loss of the former.<sup>2</sup>

§ 300. Statutes of Massachusetts<sup>3</sup> and Connecticut<sup>4</sup> provide for the continuance of a right of action for negligence to the personal representative of the person injured, in case of the death of the latter. In Massachusetts, it is held that the statute does not give the representative a right to sue upon an injury which caused *instant* death.<sup>5</sup> But in Connecticut it is held that it does.<sup>6</sup> We think that the latter construction of the statute is correct. There is no such thing, accurately speaking, as death happening simultaneously with the injury causing it. The interval may be inappreciable, but it is impossible that there should be none.<sup>7</sup> The only question is, whether

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<sup>1</sup> Franklin v. Southeastern R. Co., 3 Hurlst. & N. 211; Dalton v. Southeastern R. Co., 4 C. B. [N. S.] 296; Pym v. Great Northern R. Co., 4 Best & S. 396.

<sup>2</sup> Pym v. Great Northern R. Co., 4 Best & S. 396.

<sup>3</sup> Stat. 1842, ch. 89.

<sup>4</sup> Gen. Stat. 1866, p. 22.

<sup>5</sup> Hollenbeck v. Berkshire R. Co., 9 Cush. 481; Kearney v. Boston & Worc. R. Co., Id. 108. The smallest *perceptible* interval is held sufficient to continue the right of action (Bancroft v. Boston & Worc. R. Co., 11 Allen, 34).

<sup>6</sup> Murphy v. N. Y. & N. Haven R. Co., 30 Conn. 184. The cause of action does not arise in favor of an administrator, in Connecticut, until he is appointed (Andrews v. Hartford & New Haven R. Co., 34 Conn. 57).

<sup>7</sup> On this point Comstock, J., has well said (Whitford v. Panama R. Co., 23 N. Y.

the court shall disregard this interval on account of its extreme shortness. It might, perhaps, be justified in doing so, if the statute were in derogation of common right ; but it is not so, and the statute should be liberally construed in furtherance of its object, which is to prevent wrongdoers from escaping through the death of their victims. Under any of the other statutes that we have mentioned, it is of no importance whether the decedent died instantly from the effect of the injury, or lingered for some time afterward.<sup>1</sup>

§ 301. The foundation of every action of this kind is in the injury which caused the death, and not merely in the fact of death itself. If, therefore, an injured person makes a settlement with the person by whose fault he was injured, and releases his claim, his representatives cannot maintain any action upon his subsequent death, resulting from the injury thus compounded.<sup>2</sup>

§ 302. The rule which prevents a recovery for a negligent injury by one who has contributed thereto by his own fault, in certain cases, applies to this class of actions. The negligence of the decedent is a bar to the action of the representative in all cases in which it would have barred an action by the decedent himself, if the injury had not been fatal to him.<sup>3</sup> But the contributory neg-

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465, 486): "The death may be sudden ; in common language, instantaneous. But in every fatal casualty there must be a conceivable point of time, however minute, between the violence and the total extinction of life. \* \* \* During its continuance the right of compensation for the wrong belongs to the victim, and is capable of devolution, like other rights, upon his representative."

<sup>1</sup> Brown v. Buffalo &c. R. Co., 22 N. Y. 191.

<sup>2</sup> Read v. Great Eastern R. Co., Law Rep. 3 Q. B. 565 ; Dibble v. N. Y. & Erie R. Co., 25 Barb. 183 ; see result of the appeal in this case, 23 N. Y. 484.

<sup>3</sup> Lofton v. Vogles, 17 Ind. 105 ; Rowland v. Cannon, 35 Geo. 105 ; Denman, C. J., Tucker v. Chaplin, 2 Carr. & K. 730 ; Parke, B., Armsworth v. Southeastern R. Co., 11 Jur. 758. This doctrine has been assumed and acted upon in cases altogether too numerous to be cited (see Wilds v. Hudson River R. Co., 24 N. Y. 430 ; Johnson v.

ligence of the plaintiff on record, or of any of the persons interested in the recovery, is not an available defense, for they are in effect only assignees of the decedent's claim. The sole test on this point is to ascertain whether the decedent could have maintained an action had he lived.

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Hudson River R. Co., 20 N. Y. 65; Button v. Hudson River R. Co., 18 N. Y. 248; Witherley v. Regent's Canal Co., 12 C. B. [N. S.] 2; Louisville & Nashville R. Co. v. Collins, 2 Duvall, 114; and many other cases).

## CHAPTER XVIII.

### DRIVING AND RIDING.

- SEC. 303. Negligence in management of horses, &c.  
304. Examples of negligence.  
305. Rate of speed.  
306. Injuries committed by vicious animal.  
307. Persons on wrong side assume risk.  
308. Liability for insufficiency of vehicle.  
309. Law of the road.  
310. Violation of road-law evidence of negligence.  
311. Cases in which the law of the road does not apply.  
312. Management of horse-cars.  
313. Management of sleighs.  
314. Contributory fault.

§ 303. The rider or driver of a horse<sup>1</sup> must use ordinary care in its management, and is liable for all damages occasioned by his careless driving.<sup>2</sup> He is bound either to have an ordinary degree of acquaintance with the nature of horses, and to have and use ordinary skill in their management, or else to confine his exercises in horsemanship to his own land. But he is not bound to know the peculiar nature of the particular horse which he drives; and it is therefore not negligence *per se* to drive through the highway a horse that is in fact unmanageable, if the . . .

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<sup>1</sup> For the sake of brevity and simplicity, horses only are mentioned here; but it is to be understood that the same rules are of course applicable to the management of any other animal under like circumstances.

<sup>2</sup> In the following cases it has been held that trespass would lie for careless driving (Reynolds v. Clarke, 1 Ld. Raym. 558; Leame v. Bray, 3 East, 593; 5 Esp. 18; Sheldrick v. Aberly, 1 Esp. 55; Dean v. Braithwaite, 5 Esp. 35; Hopper v. Reeve, 7 Taunt. 698; 1 J. B. Moore, 407; Bishop v. Ely, 9 Johns. 294; Stropl v. Leavan, 39 Penn. St. 177; Waldron v. Hopper, Coxe, 339; Rappelyea v. Hulse, 7 Halst. 257; Clafin v. Wilcox, 18 Verm. 605. For cases in which it was held that case was a proper remedy, see McAllister v. Hammond, 6 Cow. 342; Barnes v. Hurd, 11 Mass. 57; Pitts v. Gaince, 1 Str. 635; 2 Ld. Raym. 1402; Morley v. Gainsford, 2 H. Bl. 442; Hall v. Pickard, 3 Campb. 187. In Day v. Edwards, 5 T. R. 648, it was held that "case" could not be maintained under the circumstances.

driver had no notice of its character.<sup>1</sup> One who drives in a crowded road must take more care than would be required of him if the road were clear.<sup>2</sup>

§ 304. It has been held to be culpable negligence (among other things) for the rider or driver of a horse to start suddenly and rapidly into the street from a yard, without keeping the horse well in hand, or looking to see if the way is clear,<sup>3</sup> to drive a horse at a trot through a crowd of children, especially when the wind is beating into their faces,<sup>4</sup> or to whip violently, while close behind another traveler, a horse which has already shown itself restive and vicious.<sup>5</sup> It is culpable negligence to put a spur into a horse when close by any person; and if under such circumstances the horse kicks the latter, the rider is responsible, without any proof that the horse was vicious.<sup>6</sup> The fact that the driver of a carriage was intoxicated when he ran against the plaintiff is some evidence that he was negligent.<sup>7</sup> The fact of the defendant allowing his horse and vehicle to go unattended on the highway, or followed by himself at such a distance that he could not control the horse, is certainly enough to warrant a jury in finding him guilty of negligence.<sup>8</sup> Reckless and noisy

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<sup>1</sup> *Hammack v. White*, 11 C. B. [N. S.] 588.

<sup>2</sup> *Garmon v. Bangor*, 38 Maine, 443; *Williams v. Richards*, 3 Carr. & K. 81; see *Edsall v. Vandemark*, 39 Barb. 589.

<sup>3</sup> *Phelps v. Wait*, 30 N. Y. 78. The defendant's servant was driving a vehicle down a hill after dark, and not having any brake, watched the horse so closely that he did not see the plaintiff until within three yards of him. He might have seen the plaintiff in time to pull up and avoid the accident, if he had not been looking at the horses so closely. In consequence of such negligence, the plaintiff was run over and injured. Held, that the defendant was liable, as his servant had not used reasonable care to prevent the accident (*Springett v. Ball*, 4 Fost. & F. 472).

<sup>4</sup> *Edsall v. Vandemark*, 39 Barb. 589.

<sup>5</sup> *Center v. Finney*, 17 Barb. 94; affirmed, 2 Seld. Notes, 44.

<sup>6</sup> *North v. Smith*, 10 C. B. [N. S.] 572.

<sup>7</sup> *Wynn v. Allard*, 5 Watts & S. 524.

<sup>8</sup> The child of the plaintiff, while playing on the road in front of her father's

driving, which so frightens a horse on or near the highway that he runs away, to the injury of the plaintiff's property, is a good cause of action, though no collision has happened.<sup>1</sup> And where the defendants, driving two sleighs, in attempting to outstrip each other, and to drive past a third person, frightened his horse, which ran against the plaintiff's sleigh and demolished it, it was held to be a question for the jury whether they were in fault or not.<sup>2</sup> Where the plaintiff's intestate had started to cross a street in a snow-storm, but, alarmed by the approach of another vehicle, turned hastily back, and was run over by the defendant's omnibus just behind her, and there was no evidence of negligence on the part of the driver, except that his head was turned another way to speak to the conductor, this was held to be insufficient to constitute even a *prima facie* case of negligence.<sup>3</sup>

§ 305. It is culpable negligence to ride at such a speed as will make it impossible to check the horse in time to avoid obstacles which may reasonably be anticipated on the road, or to turn it aside upon meeting or passing other

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door, was knocked down and hurt by the horse and cart of the defendant, then going without a driver, his servant being about a hundred yards behind his cart. Held, that the defendant was liable for his servant's negligence in letting the horse go on alone (*Baird v. Hamilton*, Hay, 29; 4 S. 790). In another case, it appeared that the plaintiff, while driving his horse and loaded wagon on a highway, being himself on foot at the time, met the loaded wagon of the defendant. The defendant had thrown his reins upon his load, and was walking behind it, the load being so high that he could not see ahead, and his horses were going without guidance. As the wagons were about meeting, the plaintiff turned as far to the right as he possibly could, then stopped his horse and got between the wheels of his wagon, and as close to the wagon as he could. The defendant did not turn out at all, and his whiffletree caught in the plaintiff's clothing, and the plaintiff was thrown down and severely injured. Held, that there was evidence of negligence proper to be left to the jury (*Welling v. Judge*, 40 Barb. 193).

<sup>1</sup> *Burnham v. Butler*, 31 N. Y. 480; *Howe v. Young*, 16 Ind. 312; see, also, *Rappelyea v. Hulse*, 7 Halst. 257.

<sup>2</sup> *Burnham v. Butler*, 31 N. Y. 480.

<sup>3</sup> *Cotton v. Wood*, 8 C. B. [N. S.] 568.



travelers, who are themselves acting prudently.<sup>1</sup> But within this limit, any degree of speed may be justified. A rider is not bound to reduce his speed to such a rate as may be necessary to avoid harm to people crossing the road in an unreasonable and improper manner. In a country road, therefore, upon which travelers are few, and foot passengers very rare, ten or twelve miles an hour would be no excessive speed, while in a crowded street such a rate of traveling would be highly culpable. So a rate of speed might be perfectly proper on all the rest of the road, which would be excessive and dangerous at a much frequented crossing. At such a place a horse must be driven slowly and cautiously.<sup>2</sup> A statute or ordinance, regulating the rate of speed to be used at a particular place, may be taken into consideration in determining whether the speed of a horse at that place was excessive.<sup>3</sup>

§ 306. The owner of a horse is not responsible for injuries committed by it purely from its own vicious disposition, while he or his servant is driving it, unless it appears that he had notice of its disposition.<sup>4</sup> It is not culpable negligence to ride such a horse in a public place, without

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<sup>1</sup> See *Davies v. Mann*, 10 Mees. & W. 546. So in *Payne v. Smith* (4 Dana, 497), where the defendant's gig, in which he was driving, at what was described as a "brisk trot" through a narrow street, came in contact with the plaintiff's horse, which was loose in the street, walking obliquely across the defendant's course, and killed it, held that the defendant was liable for the injury.

<sup>2</sup> *Williams v. Richards*, 3 Carr. & K. 81.

<sup>3</sup> In an action brought to recover damages for negligently running over the plaintiff in the street, it appeared that the plaintiff, when crossing at a street corner, was knocked down by defendant's vehicle, which was driven at a rapid rate round the corner. Held, that an ordinance of the corporation, forbidding driving faster than a walk in going around the corner of any street, was admissible in evidence, not as furnishing proof of negligence on the part of the defendant, but as tending to relieve the plaintiff from the imputation of negligence on his part (*Williams v. O'Keefe*, 9 Bosw. 536). See also *Jetter v. N. Y. & Harlem R. Co.* (2 Keyes [N. Y.], 154), in which the apparently adverse doctrine of *Brown v. Buffalo &c. R. Co.* (22 N. Y. 191) is condemned.

<sup>4</sup> *Hammack v. White*, 11 C. B. [N. S.] 588.

previously testing his nature.<sup>1</sup> If, therefore, a horse runs away with or from its master out of mere viciousness, of which his master had no notice, the latter is not liable for a collision thereby caused;<sup>2</sup> but if, by such carelessness as would be culpable in dealing with such a horse as he had reason to suppose it to be, he excites its viciousness, he is liable for the consequences, though more serious than he had reason to expect.

§ 307. Accidents may be caused in driving a vehicle, not only by mismanagement of the horses, but also by defects in the vehicle itself. For the consequences of such defects, so far as they show negligence on his part, either in permitting them to exist, or in using the vehicle with notice of its dangerous condition, the driver or his principal is liable.<sup>3</sup> Thus, if a coach should be so constructed as to strike the horses when going down hill, and they should thus be terrified into running away, and do an injury, the person in fault would be responsible for the damage. So he would if the horses were frightened into doing mischief by a break in the vehicle, caused by his negligence,<sup>4</sup> or if, in ascending a hill, the traces broke, through his fault, and let the vehicle slip back upon another man's horse or wagon.

§ 308. It is a universal custom in America for travelers, vehicles, and animals under the charge of man, to take the right hand of the road when meeting each other, if it is reasonably practicable to do so; and this rule is enforced by statute in many states, so far as it relates to travelers

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<sup>1</sup> Hammack v. White, 11 C. B. [N. S.] 588.

<sup>2</sup> Hammack v. White, 11 C. B. [N. S.] 588; Sullivan v. Scripture, 3 Allen, 564.

<sup>3</sup> No action will lie against the mere *driver*, for injuries caused merely by a defect in the vehicle, without proof of his personal negligence (Doyle v. Wragg, 1 Fost. & F. 7).

<sup>4</sup> A master is liable for an accident in consequence of the chain-stay of a cart breaking, when the horse, being frightened, ran away, causing damage; for he is guilty of negligence in not having good tackle (Welch v. Lawrence, 2 Chit. 262).

in vehicles or on horseback.<sup>1</sup> The statutes upon this subject generally prescribe that travelers shall pass to the right of the "center of the road." This means the center of the traveled or worked part of the road. No one is bound to leave that part of the road, while there is room for other travelers upon it, even entirely on one side of the road considered as a whole.<sup>2</sup> In England, while foot passengers take the right hand when meeting, the opposite rule governs horses and vehicles, which always take the left of the road.<sup>3</sup>

§ 309. The fact that a person riding on a horse or in a vehicle, or driving or leading one, was on the wrong side of the road, at the time of a collision between his horse or vehicle and that of a person coming toward him, is *prima facie* evidence of negligence on his part,<sup>4</sup> but may be explained and justified. Thus, it would be sufficient for him to show that he was drawing up to his stopping-place, or to water his horse, or to turn out of the road.<sup>5</sup> Nor is he even justified in a rigid adherence to his side, if by going a little on the other side he could avoid a collision.<sup>6</sup> The roughness of the road upon its right side is no excuse for not taking it, unless so great as to present a serious obstacle to its use.<sup>7</sup> A traveler is not required to adhere rigidly

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<sup>1</sup> A mail stage-coach is protected by act of Congress from obstruction, but is subject in all other respects to the laws of the road (*Bolton v. Colder*, 1 Watts, 360).

<sup>2</sup> *Earing v. Lansingh*, 7 Wend. 185; *Palmer v. Barker*, 2 Fairf. 338.

<sup>3</sup> The rule applies to saddled horses as well as to carriages (*Turley v. Thomas*, 8 Carr. & P. 103).

<sup>4</sup> *Burdick v. Worrall*, 4 Barb. 596; *Earing v. Lansingh*, 7 Wend. 185; *Brooks v. Hart*, 14 N. H. 307; *Kennard v. Burton*, 25 Maine, 39. But see *Wayde v. Carr* (2 Dowl. & R. 255), where, in case for negligent driving, the defendant's carriage having been on the wrong side of the road, and, in attempting to pass on that side, the plaintiff sustained damage, it was held, that it was for the jury to decide the question of negligence without regard to the law of the road.

<sup>5</sup> See *Burdick v. Worrall*, 4 Barb. 596; *Palmer v. Barker*, 2 Fairf. 338.

<sup>6</sup> *O'Maley v. Dorn*, 7 Wisc. 236; *Turley v. Thomas*, 8 Carr. & P. 103; see *Chaplin v. Hawes*, 3 Id. 554; *Mayhew v. Boyce*, 1 Stark. 423.

<sup>7</sup> *Earing v. Lansingh*, 7 Wend. 185. Compare *Wordsworth v. Willan*, 5 Esp. 273.

to his own side of the road, at a time during daylight when no other traveler is in sight ;<sup>1</sup> and the rule concerning contributory negligence will prevent one from recovering damages against another who, though driving on the wrong side of the road, yet left ample room for other travelers to pass him,<sup>2</sup> unless, indeed, peculiar circumstances exist which relieve the plaintiff from the natural presumption of negligence. .

§ 310. The person on the wrong side of the road must, however, leave much more than a sufficiency of room for other travelers.<sup>3</sup> He assumes the risk of all experiments in this direction, and is bound to use more care, and to keep a better lookout for approaching vehicles, than would otherwise be required of him ;<sup>4</sup> while those who pass him on their proper side of the road have a right to presume that no greater caution or skill will be required on their part than would be necessary if he were on his own side of the road. By an unnecessary deviation from his proper side of the road, he takes the risk of the consequences which may arise from his inability to get out of the way of another traveler approaching on the right side of the road, and will be responsible for injuries sustained by the latter while acting with ordinary care,<sup>5</sup> and cannot recover for injuries sustained by himself,<sup>6</sup> otherwise than by want of ordinary care on the part of the other traveler after becoming aware of the danger to which both were exposed.<sup>7</sup>

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<sup>1</sup> *Foster v. Goddard*, 40 Maine, 64 ; *Aston v. Heaven*, 2 Esp. 533 ; see *Smith v. Gardner*, 11 Gray, 418.

<sup>2</sup> *Clay v. Wood*, 5 Esp. 44 ; *Wordsworth v. Willan*, Id. 273 ; *Cruden v. Fentham*, 2 Id. 680. In the last case, the jury found a verdict contrary to the ruling of Lord Kenyon upon this point ; but the court refused to disturb the verdict, though approving this doctrine. In *Burdick v. Worrall* (4 Barb. 596), a plea substantially to this effect was held insufficient, but the decision seems to us unsatisfactory.

<sup>3</sup> *Chaplin v. Hawes*, 3 Carr. & P. 554 ; *Wordsworth v. Willan*, 5 Esp. 273.

<sup>4</sup> *Pluckwell v. Wilson*, 5 Carr. & P. 375.

<sup>5</sup> *Brooks v. Hart*, 14 N. H. 307.

<sup>6</sup> *Burdick v. Worrall*, 4 Barb. 596.

<sup>7</sup> *Spofford v. Harlow*, 3 Allen, 176 ; *Davies v. Mann*, 10 Mees. & W. 546.

The rule of the road must be very strictly observed at night, or in a dense fog; and, at such times, the fact that there is no other person on the road is not a sufficient excuse for deviating from the proper side.<sup>1</sup>

§ 311. The "law of the road," as the rule requiring parties to keep to the right is commonly called, has no application to the meeting of vehicles on a railroad with vehicles of a different kind. The former cannot turn off their path, and the latter may and should turn to that side which appears, under the circumstances, to be safest, without regard to the usual rule. The fact that either vehicle was, at the time of collision, on the left of the road, is therefore no evidence of negligence.<sup>2</sup> Nor does it extend to the case of a building moved along the road upon rollers.<sup>3</sup> A traveler on foot or on horseback must give way to, and, if necessary, cross the road for, a vehicle with a heavy load,<sup>4</sup> and a lightly loaded vehicle must in like manner give way to a heavily loaded one.<sup>5</sup> But a team with a heavy load ought, without being asked, to stand still, if it cannot get out of the way, so as to let a lighter vehicle pass.<sup>6</sup> As the terms in which we have stated the rule clearly imply, the law does not require either of two travelers going in the same direction to turn to the right of the other.<sup>7</sup> They must pass each other in

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<sup>1</sup> Per Lord Kenyon, *Cruden v. Fentham*, 2 Esp. 685.

<sup>2</sup> *Hegan v. Eighth Av. R. Co.*, 15 N. Y. 380. When a cart and a railway car come into collision, while progressing side by side, with a space of one or two feet between them, the presumption of negligence is altogether against the driver of the cart (*Suydam v. Grand Street &c. R. Co.*, 41 Barb. 375).

<sup>3</sup> *Graves v. Shattuck*, 35 N. H. 257.

<sup>4</sup> *Beach v. Parmeter*, 23 Penn. St. 196. There the rule was applied in favor of a wagon carrying three persons. So in *Washburn v. Tracy* (2 Chipm. 136), it was said that a rider on horseback should give way to a vehicle.

<sup>5</sup> *Grier v. Sampson*, 27 Penn. St. 183.

<sup>6</sup> *Kennard v. Burton*, 25 Maine, 39.

<sup>7</sup> *Bolton v. Colder*, 1 Watts, 360.

such manner as may be most convenient under the particular circumstances. Nor has the rule any application in favor of persons crossing or turning into the road; and in an action by such a person for injuries received from a collision with a traveler going along the road, the fact that the latter was on the wrong side of the road is no evidence of negligence.<sup>1</sup>

§ 312. Cars drawn by horses upon rails are in the main governed by the same rules as other vehicles. But their peculiar circumstances, of course, require some special applications of the general rules. Thus the comparative noiselessness of their movement requires that some warning should be given of their approach; and a jury has therefore the right to hold their proprietors negligent in not providing bells for the horses, and lights at night for the cars.<sup>2</sup> As they cannot turn out of their straight path, the "law of the road" does not apply either to them or to any vehicle meeting them.<sup>3</sup> And for the same reason, when a collision occurs between an ordinary vehicle and a railroad car traveling side by side, the presumption is that the driver of the former was negligent.<sup>4</sup> Inasmuch as the injuries which are caused by a railroad car are more serious than those inflicted by most other vehicles, it seems that a greater degree of care should be required of car drivers than of most other drivers.<sup>5</sup> Where a car driver twisted

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<sup>1</sup> So held in the case of a foot passenger crossing the road (*Lloyd v. Ogleby*, 5 C. B. [N. S.] 667); and in the case of a vehicle turning into the road (*Lovejoy v. Dolan*, 10 Cush. 495). So in *Smith v. Gardner* (11 Gray, 418), it was held that the mere fact that a carriage was unnecessarily on the left of the middle part of a traveled road, does not, under the Revised Statutes, c. 51, § 1, prevent its owner from recovering damages for a collision with another carriage turning in from a cross road, and negligently driven against the plaintiff's. A person driving a vehicle across the street is bound to see that he does not interfere with others in the proper exercise of their right of passing (*Fales v. Dearborn*, 1 Pick. 345).

<sup>2</sup> *Johnson v. Hudson River R. Co.*, 29 N. Y. 65.

<sup>3</sup> *Hegan v. Eighth Av. R. Co.*, 15 N. Y. 380.

<sup>4</sup> *Suydam v. Grand Street R. Co.*, 41 Barb. 375; 17 Abb. Pr. 304.

<sup>5</sup> See *Mangam v. Brooklyn City R. Co.*, 36 Barb. 230, 236.

the reins about the brake, and, turning his back upon the horses, left them to trot at the usual pace, while amusing himself with other matters, he was held guilty of gross negligence.<sup>1</sup>

§ 313. The movement of sleighs on the snow being comparatively noiseless, it is universally customary to attach bells to them, or to the horses; and this is frequently required by statute. The want of such bells must certainly be considered culpable negligence, wherever they are required by statute; and we think that it would be so held at common law. But, even where such a statute exists, the omission is not enough to entitle a plaintiff, in a case of collision, to a verdict, without some evidence showing that the collision was brought about by the want of the warning which the bells would have given.<sup>2</sup>

§ 314. As in other cases, no action can be maintained for an injury caused by the defendant's negligence in driving, if the plaintiff's own negligence proximately contributed to the injury.<sup>3</sup> This rule applies as much where the defendant is in fault for being on the wrong side of the road, as to other cases.<sup>4</sup> It is the duty of persons who are driving over a crossing for foot passengers, which is at the entrance of a street, to drive slowly, cautiously, and carefully; but it is also the duty of a foot passenger to use due care and caution in going upon a crossing at the entrance of a street, so as not to get

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<sup>1</sup> *Mangam v. Brooklyn City R. Co.*, 36 Barb. 230; S. C. affirmed, 38 N. Y. 455.

<sup>2</sup> *Kidder v. Dunstable*, 11 Gray, 342.

<sup>3</sup> *Parker v. Adams*, 12 Metc. 415; *Welling v. Judge*, 46 Barb. 193; *Burdick v. Worrall*, 4 Id. 596; *Bigelow v. Reed*, 51 Maine, 325; *Washburn v. Tracy*, 2 Chipm. 136; *Boland v. Missouri R. Co.*, 36 Mo. 484. Evidence that the drivers of two coaches on the same route mutually attempted several times to intercept each other's progress by "cutting each other off," is not sufficient to prove that, in a subsequent collision on the same trip, they were both in fault (*Munroe v. Leach*, 7 Metc. 274).

<sup>4</sup> *Kennard v. Burton*, 25 Maine, 39; *Parker v. Adams*, 12 Metc. 415.

among the carriages, and thus receive injury.<sup>1</sup> It is not contributory negligence, on the part of a foot traveler, to walk on the carriage-way of a country road, even though a sidewalk be provided.<sup>2</sup> But the same act in the crowded streets of a city would undoubtedly raise a presumption of negligence, because it would be so unusual, that persons riding or driving along the streets would not be bound to foresee it, and thus the pedestrian would expose himself to serious risk of injury. Still, we should hold the question to be one fit for the decision of the jury, in view of all the circumstances.<sup>3</sup> Where the sidewalk is crowded, and the carriage-way comparatively free, it is quite usual for foot passengers to resort to the latter; and when the sidewalk is obstructed by merchandise or by repairs, it is necessary for them to do so. In such cases, the act is not even presumptive evidence of negligence. And in all cases, the reckless driving of the defendant, after becoming aware that the plaintiff is upon the carriage-way, deprives him of the right to plead the plaintiff's negligence as an excuse. It may be contributory negligence on the part of one who complains of an injury caused by a fright given to his horse by the defendant's careless driving, to have left his horse unfastened and unattended, especially if it was spirited; but the question is one to be determined by a jury.<sup>4</sup> So, where the plaintiff walked between the wheels of his own wagon, on

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<sup>1</sup> Per Pollock, C. B., *Williams v. Richards*, 3 Carr. & K. 81; approved by Erle, C. J., *Cotton v. Wood*, 8 C. B. [N. S.] 568.

<sup>2</sup> *Coombs v. Purrington*, 42 Maine, 332. A foot passenger, though he may be infirm from disease, has a right to walk in the carriage-way, and is entitled to the exercise of reasonable care on the part of persons driving carriages along it (*Boss v. Litton*, 5 Carr. & P. 407).

<sup>3</sup> Where a number of laborers were clearing snow from the middle of the street, and a wagon, proceeding slowly, ran over one of them, it was held that the question of contributory negligence could not be taken from the jury (*Quick v. Holt*, 99 Mass. 164).

<sup>4</sup> *Park v. O'Brien*, 23 Conn. 339.



the side upon which the defendant's wagon was approaching him, both being heavily loaded, the jury are not bound to find him in fault for so doing.<sup>1</sup> The degree of care which a traveler ought to use in crossing the track upon which a horse-car is approaching does not vary from that which ought to be used in respect to other vehicles. The care required in passing before a locomotive is not demanded in this case.<sup>2</sup>

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<sup>1</sup> *Welling v. Judge*, 40 Barb. 193.

<sup>2</sup> *Baxter v. Second Av. R. Co.*, 30 How. Pr. 219.

## CHAPTER XIX.

### FENCES.\*

- SEC. 315. No obligation to fence, at common law.  
316. Peculiar rule in some states.  
317. Statutory rules and their effect.  
318. Statutory remedy, when not exclusive.  
319. Effect of contract to maintain fences.  
320. What animals are within the statutes.  
321. Who are entitled to protection of animals by fence.  
322. Who are entitled to protection against animals by fence.  
323. Who are liable for defect of fence.  
324. Liability for damage to animals through want of fence.  
325. Liability for damage by animals through want of fence.  
326. Partition fences.

§ 315. By the common law of England, the owners of land are under no obligation to fence out cattle,<sup>1</sup> and therefore the want of a fence is no further objection to a recovery for damage done by animals than it is made by positive statute or usage. The common law of England in this respect is also the common law of New York,<sup>2</sup> Massachusetts,<sup>3</sup> Maine,<sup>4</sup> New Hampshire,<sup>5</sup> Maryland,<sup>6</sup> New Jer-

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\* The rules peculiar to railroad fences will be found in the chapter on RAILROAD FENCES, *infra*.

<sup>1</sup> Wells v. Howell, 19 Johns. 385; Stafford v. Ingersoll, 3 Hill, 38; Brady v. Ball, 14 Ind. 317. This rule is as old as the Year Books. Thus, in 20 Ed. 4, fo. 10 b, where in trespass for entering plaintiff's close with beasts, the defendant pleaded that they were lawfully on a common adjoining plaintiff's land, and entered without defendant's knowledge, Brian, J., said: "If the land in which he ought to have this common is not inclosed, as it is here, he ought to keep his beasts in the common, and out of the land of another." Littleton, J., added, "I think so too, for I understand that this is the law." The defendant then sought to plead that his beasts were driven upon the land by wild dogs; but this was overruled, and he pleaded not guilty.

<sup>2</sup> Munger v. Tonawanda R. Co., 4 N. Y. 349; affirming S. C., 5 Denio, 255; Wells v. Howell, 19 Johns. 385.

<sup>3</sup> Rust v. Low, 6 Mass. 90; Thayer v. Arnold, 4 Metc. 589. So held, notwithstanding the statute of 1788, c. 65, which provides that a person may bring trespass &c., when his land is inclosed with a legal and sufficient fence.

<sup>4</sup> Little v. Lathrop, 5 Greenl. 357.

<sup>5</sup> Avery v. Maxwell, 4 N. H. 36.

<sup>6</sup> Richardson v. Milburn, 11 Md. 340.

sey,<sup>1</sup> Indiana,<sup>2</sup> Michigan,<sup>3</sup> and some other states. One who leases a tract of land, not fenced off from other land owned by him, is under an additional obligation, as a landlord, not to turn cattle loose into such other land, since they will necessarily stray upon the leased land, to the injury of the lessee. This duty remains, even in states which have adopted a rule contrary to that of the common law in respect to fences generally.<sup>4</sup>

§ 316. In several states of the American Union, the common law rule concerning fences has never been in force; and the owner of animals is under no obligation to fence them in, while the occupant of land must at his own peril fence them out. In these states, therefore, the owner of cattle has only such liability for damage done by his animals upon the unfenced land of other persons,<sup>5</sup> while he has the same right to recover for damage, suffered by them there,<sup>6</sup> as he would have in case the animals had entered upon such land with the permission of its owner. In short, the absence of a fence is treated as an implied permission for the entry of all animals. This is the com-

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<sup>1</sup> *Coxe v. Robbins*, 4 Halst. 384.

<sup>2</sup> *Williams v. New Albany & Salem R. Co.*, 5 Ind. 111; *Lafayette & Ind. R. Co. v. Shriner*, 6 Id. 141; *Myers v. Dodd*, 9 Id. 290; *Page v. Hollingsworth*, 7 Id. 317; *Brady v. Ball*, 14 Id. 317.

<sup>3</sup> *Johnson v. Wing*, 3 Mich. 163.

<sup>4</sup> The owner of a field leased eight acres of it: the whole being under a common inclosure, without any division fence. The lessor turned his stock upon the ground possessed by himself, and they went then to the land occupied by the lessee, and consumed his crop. Held, that the lessor had no right to prevent the lessee from reaping the full benefit thereof, and that the removal of the inclosure so as to let in his stock, was an injury for which trespass *vi et armis* would lie, and that the lessee was not bound to erect a division fence, nor to aver in his declaration that the lessor was bound to do so (*Henley v. Neal*, 2 Humph. 551).

<sup>5</sup> *Laws v. North Carolina R. Co.*, 7 Jones [N. C.] Law, 468; *Wagner v. Bissell*, 3 Iowa, 396; *Comerford v. Dupuy*, 17 Cal. 308.

<sup>6</sup> *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172; *Cincinnati, H. & D. R. Co. v. Waterson*, 4 Id. 424; *Cleveland, C. & C. R. Co. v. Elliott*, Id. 474.

mon law of North Carolina,<sup>1</sup> Ohio,<sup>2</sup> California,<sup>3</sup> and apparently in Mississippi.<sup>4</sup> In other states, such as Pennsylvania,<sup>5</sup> Iowa,<sup>6</sup> and Illinois,<sup>7</sup> a midway rule has been adopted, and no one is bound either to fence in or fence out animals. It is no trespass for them to enter on any unfenced land; but they do so at the risk of their owner, as far as their own safety is concerned. Of course, in all these states, the owner of an animal which breaks through a sufficient fence is liable for its trespass as at common law,<sup>8</sup> and cannot recover for any injury suffered by the animal in consequence thereof.<sup>9</sup> The owner of unfenced land in any of these states may drive off animals straying upon his land, in a reasonable and prudent manner, but is responsible for any injury done to them by his want of ordinary care in so doing. He is not liable, however, for any injury that befalls them after he has driven them upon the highway and has ceased pursuit.<sup>10</sup>

§ 317. In other states, the subject is regulated by statutes or local ordinances requiring the owner of land to fence it, and depriving him of all right to complain of trespasses by animals committed by reason of the want of such fence.<sup>11</sup> Such is the effect of the statutes in force in Connecticut from the earliest period.<sup>12</sup> In New York, every

<sup>1</sup> *Laws v. North Carolina R. Co.*, 7 Jones [N. C.] Law, 468.

<sup>2</sup> *Cleveland, C. & C. R. Co. v. Elliott*, 4 Ohio St. 474; *Cincinnati, H. & D. R. Co.*, Id. 424; *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 Id. 172.

<sup>3</sup> *Waters v. Moss*, 12 Cal. 535; *Comerford v. Dupuy*, 17 Id. 308.

<sup>4</sup> *Dickson v. Parker*, 3 How. [Miss.] 219.

<sup>5</sup> *N. Y. & Erie R. Co. v. Skinner*, 19 Penn. St. 301; *Knight v. Abert*, 6 Id. 472; *North Penn. R. Co. v. Rehman*, 49 Id. 101.

<sup>6</sup> *Herold v. Meyers*, 20 Iowa, 378; *Wagner v. Bissell*, 3 Iowa, 396.

<sup>7</sup> *Seeley v. Peters*, 5 Gilm. 130; *Chicago & C. R. Co. v. Patchin*, 16 Ill. 198; *Stover v. Shugart*, 45 Ill. 76.

<sup>8</sup> *McManus v. Finan*, 4 Iowa, 283.

<sup>9</sup> *Morrison v. Cornelius*, 63 N. Car. 346.

<sup>10</sup> *Palmer v. Silverthorn*, 32 Penn. St. 65.

<sup>11</sup> See *Van Leuven v. Lyke*, 1 N. Y. 515, 517.

<sup>12</sup> *Studwell v. Ritch*, 14 Conn. 292; see *Wright v. Wright*, 21 Conn. 329, 344.

landowner is required by statute to maintain an equal share of the fences between himself and the adjoining owners, unless less than half of either adjoining farm is cleared or improved, and he chooses to let his land lie open to the public.<sup>1</sup> In case of default in this respect, the party in fault is liable for all damages caused thereby.<sup>2</sup> In Vermont, a similar statute exists, extending, however, to all lands not entirely unoccupied on both sides of the line, and expressly excepting the side of land facing a highway.<sup>3</sup> In New York, each town, at its annual meeting, may prescribe what shall be deemed a sufficient fence therein; after which, by the law as it stood until recently, no one who

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<sup>1</sup> 1 N. Y. Rev. Stat. 353, §§ 30, 31, as amended by Laws of 1866, ch. 540, p. 1150. The words "as a common," added by Laws of 1860, ch. 267, are now omitted, and the statute reads as follows: "Where two or more persons shall have lands adjoining, each of them shall make and maintain a just proportion of the division fence between them, except the owner or owners of either of the adjoining lands shall choose to let such lands lie open to a public common" (§ 30). "Where a person shall have chosen to let his land lie open, if he shall afterward inclose it, he shall refund to the owner of the adjoining land a just proportion of the value at that time of any division fence that shall have been made by such adjoining owner; or he shall build his proportion of such division fence" (§ 31).

<sup>2</sup> *Id.* § 37.

<sup>3</sup> "Each of the owners of adjoining lands, or others occupying, shall make and maintain equal portions of the division fence between their respective lands, except such lands as the owner or owners thereof shall choose to let lie vacant and common" (Verm. Gen. Stat. [1863], ch. 102, § 2). "Whenever the lands of two or more individuals be so situated that either party may not be compelled to build and keep in repair a fence on the dividing line between their lands respectively, by reason of open or unoccupied lands or highways lying between, each owner or keeper shall be liable for all damages done on the occupied lands of others by reason of any animal straying from his lands, and being taken on the occupied lands of others" (*Id.* § 5). The defendant's horse escaped from his meadow by reason of the fences being defective, and frightened the plaintiff's horse, while on the highway in front of the defendant's land, so that he ran away and injured himself. There was no evidence that the defendant knew of the vicious properties of his horse. Held, that the defendant was not liable, as he was not in fault so long as he prevented the horse from entering upon the land of some other private person. Barrett, J., said: "Under our more recent statutes, the law now is in this state, as it ever has been in England and other of the American states, that the owner of land is under no obligation to fence his land along the highway." The obligation in this respect results only from his duty to restrain his own cattle from trespassing upon his neighbor" (*Holden v. Shattuck*, 34 Verm. 336, 343).

neglected to keep such a fence could recover damages for injuries "done by any beast lawfully going at large on the highways," and entering upon land not thus fenced.<sup>1</sup> Each town was also formerly empowered in like manner to determine at what time animals should be permitted to go at large upon the highways.<sup>2</sup> Similar statutes have been enacted in Maine,<sup>3</sup> going further, however, and prohibiting any recovery against the owner of cattle breaking through an insufficient fence. But in 1862 an act was passed by the legislature of New York, making it unlawful for cattle, horses, sheep, and swine to run at large in any public highway;<sup>4</sup> so that the power of the towns over that subject has been taken away in that state. In Indiana, no damages are recoverable for the trespass of a domestic animal

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<sup>1</sup> 1 N. Y. Rev. Stat. 355, § 44; as construed in *Hardenburgh v. Lockwood*, 25 Barb. 9; *Griffin v. Martin*, 7 Id. 297. The text of the statute is as follows: "Whenever the electors of any town shall have made any rule or regulation prescribing what shall be deemed a sufficient fence in such town, any person who shall thereafter neglect to keep a fence, according to such rule or regulation, shall be precluded from recovering compensation in any manner for damages done by any beast lawfully going at large on the highways, that may enter on any lands of such person not fenced in conformity to the said rule or regulation, or for entering through any defective fence."

<sup>2</sup> 1 N. Y. Rev. Stat. 341, § 5, sub. 11. The constitutionality of this provision was affirmed in *Griffin v. Martin*, 7 Barb. 297; *Hardenburgh v. Lockwood*, 25 Id. 9.

<sup>3</sup> Maine Rev. Stat. [1857], ch. 23, §§ 4, 5. These sections are as follows: "A town may, by vote at its annual meeting, permit cows and any other neat beasts to go at large in the whole or a specified part of the town, at any time during one year from the meeting; and may pass by-laws to regulate the going at large of cattle and swine therein, consistent with the laws of the state, and enforce them by penalties" (§ 4). "Any person injured in his land by sheep, swine, horses, asses, mules, goats, or neat cattle, in a common or general field, or in a close by itself, may recover his damage by distraining any of the beasts doing it, and proceeding as hereinafter directed, or in an action of trespass against the person owning or having the possession of the beasts at the time of the damage, and there shall be a lien on said beasts, and they may be attached in such action and held to respond the judgment as in other cases, whether owned by the defendant or only in his possession. But if the beasts were lawfully on the adjoining lands, and escaped therefrom in consequence of the neglect of the person suffering the damage to maintain his part of the partition fence, their owner shall not be liable therefor" (§ 5).

<sup>4</sup> Laws of N. Y. 1862, ch. 459, p. 844. See *Cowles v. Balzer*, 47 Barb. 562. The effect of this statute has been very salutary, and affords strong evidence of the wisdom of the common law rule, at any rate, in its application to every thickly settled country.

entering from the highway, unless the land was protected by such a fence as good husbandmen generally keep;<sup>1</sup> but as to animals entering from an adjoining close, the common law remains in force;<sup>2</sup> while in New Jersey the entry of an animal from the highway is a trespass, no one being bound to fence against it.<sup>3</sup>

§ 318. Where, as in Maine, Vermont, New York, Indiana, and other states, the statute empowers a landowner to repair, at the expense of an adjoining proprietor, fences which the latter ought to, but does not, keep in repair, this does not deprive the former of the right to sue for injuries sustained by his cattle through the defect of the fence.<sup>4</sup> Neither does a provision enabling the injured party to obtain an appraisal of his damages from fence-viewers confine him to that remedy.<sup>5</sup>

§ 319. A contract to maintain a fence certainly deprives the person, upon whom the duty of maintaining it is thus devolved, of all right to complain of injuries suffered by his animals,<sup>6</sup> or by the entry of animals upon his land,<sup>7</sup> for want of a sufficient fence; and if they stray upon the land against which he has bound himself to fence,

<sup>1</sup> 1 Ind. Rev. Stat. 292; as construed in *Myers v. Dodd*, 9 Ind. 290. The following are the words of the statute: "Any structure, or hedge, or ditch, in the nature of a fence, used for purposes of inclosure, which is such as good husbandmen keep, and as shall, on the testimony of skillful men, appear to be sufficient, shall be deemed a lawful fence." "If any domestic animal break into an inclosure, the person injured thereby shall recover the amount of damage done, if it shall appear that the fence through which said animal broke was lawful; but not otherwise."

<sup>2</sup> *Myers v. Dodd*, 9 Ind. 290. We think that this decision entirely misconstrued the statute, however.

<sup>3</sup> *Chambers v. Matthews*, 3 Harrison, 368. Such seems to be also the law in Vermont (*Holden v. Shattuck*, 34 Verm. 336).

<sup>4</sup> *Saxton v. Bacon*, 31 Verm. 540; see *Eames v. Patterson*, 8 Grænl. 81. In *Myers v. Dodd* (9 Ind. 290), it seems to have been assumed that the statutory remedy was exclusive.

<sup>5</sup> *Stafford v. Ingersoll*, 3 Hill, 38.

<sup>6</sup> *Cincinnati, H. & D. R. Co. v. Waterson*, 4 Ohio St. 424.

<sup>7</sup> *York v. Davis*, 11 N. H. 241; see *Rust v. Low*, 6 Mass. 90.

he is liable as a trespasser.<sup>1</sup> Such a contract, once made, is irrevocable, except by mutual consent, or in some mode provided by statute, as by calling on the fence-viewers, whose jurisdiction is not precluded by a mere oral agreement.<sup>2</sup> A duty to fence may also be established by prescription,<sup>3</sup> or by usage. And a usage to allow cattle to run at large, and to graze on unfenced ground, especially if practically adopted by the party complaining of their entry, is a good defense.<sup>4</sup>

§ 320. Statutes in relation to fences are enacted for the benefit of owners of domestic animals, and not of wild ones, and any general phrases used in such statutes should be restricted accordingly.<sup>5</sup> These statutes are in general so worded as expressly to exclude from their scope small animals, which cannot be shut out by such fences as farmers use. But even where such clear language is not used, such animals are not within the meaning of these statutes.

§ 321. The obligation to fence out animals, where it is imposed by law, only applies in favor of the owner of animals *lawfully* on the adjoining close.<sup>6</sup> And therefore the owner of an animal which, trespassing upon another's land, breaks through the defective fence between that land and the land of a third person, cannot recover damages for a consequent injury from the last-mentioned person,

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<sup>1</sup> See *Cincinnati, H. & D. R. Co. v. Waterson*, 4 Ohio St. 424.

<sup>2</sup> *York v. Davis*, 11 N. H. 241.

<sup>3</sup> See *Rust v. Low*, 6 Mass. 90.

<sup>4</sup> *Wheeler v. Rowell*, 7 N. H. 515.

<sup>5</sup> *Canefox v. Crenshaw*, 24 Mo. 119.

<sup>6</sup> *Holladay v. Marsh*, 3 Wend. 142; *Lawrence v. Combs*, 31 N. H. 331; *Stackpole v. Healy*, 16 Mass. 33; *Lord v. Wormwood*, 29 Maine, 282; *Little v. Lathrop*, 5 Greenl. 357. This is expressly provided by most of the statutes, and is to be implied where not so provided (*Rust v. Low*, 6 Mass. 90, 97).



although he was bound to keep the fence in good repair.<sup>1</sup> Neither can the owner of cattle, not *lawfully* on the highway, complain of the want of a fence between the defendant's land and the highway,<sup>2</sup> or avail himself of such defect as a defense to a claim for damage done by his cattle.<sup>3</sup> Cattle left to stray on the highway are not lawfully there<sup>4</sup> (in any state governed by the rules of the common law), unless authorized so to stray by the legislature. In Connecticut, by an exception in the statute, peculiar to that state, the owner of an animal going at large contrary to law, or of such an unruly disposition that it will not be restrained by ordinary fences, is liable for its entry upon land of another person, though not sufficiently fenced.<sup>5</sup>

§ 322. Only the adjoining owner is entitled to the benefit of a fence, as a protection against the trespasses of animals. A third person, not claiming under the adjoining owner, cannot complain of a defect in the defendant's fences, even though he may have suffered an injury from an animal, which he would not have suffered had the defendant maintained a proper fence.<sup>6</sup> In Maine, it is held that cattle allowed by vote of the town to roam on the highway are nevertheless not properly on land adjoining it, though unfenced; and therefore that if they stray through the land of A., lying unfenced by the highway, upon land of B., lying behind A.'s land, though also unfenced, B. can sue their owner for trespass.<sup>7</sup>

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<sup>1</sup> Lawrence v. Combs, 31 N. H. 331.

<sup>2</sup> Holladay v. Marsh, 3 Wend. 142; North Penn. R. Co. v. Rehman, 49 Penn. St. 101.

<sup>3</sup> Lyman v. Gipsen, 18 Pick. 422; Stackpole v. Healy, 16 Mass. 33.

<sup>4</sup> North Penn. R. Co. v. Rehman, 49 Penn. St. 101; Avery v. Maxwell, 4 N. H. 36; Stackpole v. Healy, 16 Mass. 33; Chambers v. Matthews, 3 Harrison, 368.

<sup>5</sup> Barum v. Vandusen, 16 Conn. 200.

<sup>6</sup> Ryan v. Rochester & Syracuse R. Co., 9 How. Pr. 453. In that case, the plaintiff was injured by a horse, belonging to one V. M., which strayed through a fence between the land of V. M. and of the defendant (which it was the defendant's duty to maintain), and fell upon the plaintiff. Held, that he could not recover.

<sup>7</sup> Lord v. Wormwood, 29 Maine, 282.

§ 323. Not only is the landowner himself, when in default with respect to fences which he was bound to maintain, liable for injuries done by his cattle through such defect of fences, but one whose cattle are upon the land is liable for the breach of his cattle upon the adjoining land. The fact that they were lawfully upon the former premises does not affect the question.<sup>1</sup>

§ 324. The want of a fence is generally, if not invariably, only the *remote* cause of an injury to animals.<sup>2</sup> The immediate cause is the danger upon which they fall after coming within the bounds where the fence ought to be.<sup>3</sup> There must be some negligence in respect to this proximate cause of the injury, on the part of the defendant, in order to charge him with liability for it.<sup>4</sup> If the danger to which animals are exposed, in case of their entry upon the land through the defective fence, is one which the defendant should reasonably have foreseen they would encounter, he is liable for it; but if otherwise, he is not.<sup>5</sup> This is a question of fact, not of law.<sup>6</sup> A landowner, who does not maintain a fence, and thus leaves his land open to animals, may relieve himself of all liability for injuries happening to them from any thing lawfully kept on his land, by giving warning thereof to the owners of the animals.<sup>7</sup>

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<sup>1</sup> *Stafford v. Ingersoll*, 3 Hill, 38.

<sup>2</sup> *Cleveland, C. & C. R. Co. v. Elliott*, 4 Ohio St. 474.

<sup>3</sup> *Ib.*

<sup>4</sup> *Cleveland, C. & C. R. Co. v. Elliott*, 4 Ohio St. 474; *Saxton v. Brown*, 31 Verm. 540; *Holden v. Rutland & C. R. Co.*, 30 Id. 297.

<sup>5</sup> *Ib.*; see *Powell v. Salisbury*, 2 Younge & J. 391.

<sup>6</sup> *Saxton v. Brown*, 31 Verm. 540.

<sup>7</sup> *Walker v. Herron*, 22 Tex. 55. There it appeared that defendant kept diseased cattle on his unfenced land, and that he warned the plaintiff to keep his cattle off on that account; notwithstanding which the plaintiff's cattle strayed there, and caught the disease. Held, that the plaintiff could not recover. For other cases of injuries suffered by animals from poison, &c., see *Morrison v. Cornelius*, 63 N. Car. 346; *Herold v. Meyers*, 20 Iowa, 378.

§ 325. But the want of a proper fence is usually the proximate cause of an injury *by* animals, for it is evidently the immediate occasion of their trespass. No one can, therefore, recover damages for an injury done by animals lawfully upon the adjoining close, entering upon his land, at a place where he was bound to, but did not, maintain a sufficient fence,<sup>1</sup> unless the owner of the animal willfully turned it into the plaintiff's land,<sup>2</sup> or unless the injury is such as he could recover upon, if the entry of the animal had been with his express permission, or unless the animal was one of a species, or belonged to an owner, in whose favor the obligation to fence did not apply. And if the outer boundary is unfenced, it is not a trespass for animals to break through an inner fence;<sup>3</sup> the destruction of the inner fence being an injury of only the same character as the destruction of herbage, &c., for which it is well settled that no action will lie under such circumstances.

§ 326. Where a partition fence exists, and each adjoining owner has a definite portion assigned to his charge, he cannot recover from any adjoining owner for the breach of cattle through that portion of the fence, if it is defective;<sup>4</sup> but may recover for their breach through any other place. If no particular portion has been assigned to the charge of any of the adjoining owners, it is held in Maine and Connecticut that none of them can recover for such breaches of cattle;<sup>5</sup> while in New Hampshire, Massachusetts, New Jersey, and Michigan, it is held that any of

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<sup>1</sup> Cowles v. Balzer, 47 Barb. 562, 573; Shepherd v. Hees, 12 Johns. 433; Page v. Olcott, 13 N. H. 399; Woodward v. Purdy, 20 Ala. [N. S.] 379.

<sup>2</sup> Broadwell v. Wilcox, 22 Iowa, 568.

<sup>3</sup> Page v. Olcott, 13 N. H. 399.

<sup>4</sup> Cowles v. Balzer, 47 Barb. 562, 573; Shepherd v. Hees, 12 Johns. 433; Saxton v. Brown, 31 Verm. 540; Holden v. Rutland &c. R. Co., 30 Id. 297; York v. Davis, 11 N. H. 241.

<sup>5</sup> Gooch v. Stephenson, 13 Maine, 371; Studwell v. Ritch, 14 Conn. 292.

them can : their neglect to procure such an assignment being deemed equivalent to an election to occupy their land under the rules of the common law.<sup>1</sup> In New York, one who throws down his part of the division fence between himself and an adjoining owner, is remitted to his common law duties, and must, at his peril, confine his cattle within his own bounds. If they stray upon the adjoining land, through the breach thus made, he is liable for injuries done by them.<sup>2</sup>

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<sup>1</sup> *Tewksbury v. Bucklin*, 7 N. H. 518 ; *Thayer v. Arnold*, 4 Metc. 589 ; *Coxe v. Robbins*, 4 Halst. 384 ; *Johnson v. Wing*, 3 Mich. 163.

<sup>2</sup> *Holladay v. Marsh*, 3 Wend. 142.

## CHAPTER XX.

### FIRE.

- SEC. 327. Fire accidentally kindled on one's own land.  
327 *a*. The rule in New York.  
328. Fire purposely kindled.  
329. Fire kindled to clear land.  
330. Firing other land.  
331. Statutory rules in different states.  
332. Liability of railroad company for fire communicated from locomotives.  
333. Evidence in such cases.  
334. Statutory liability of railroads in such cases.  
335. Plaintiff's contributory fault.

§ 327. By the common law of England, one who negligently sets fire to his own house, or to any thing on his own land, was liable for the destruction of the property of another person to which the fire extended, without any further fault on his part.<sup>1</sup> Certain English statutes, enacted before the separation of the American colonies, and, therefore, incorporated into our common law, are held by the Supreme Court of New York to have relieved the owner of real property from liability for the spread of a fire beginning accidentally thereon, even though he was negligent in allowing it to begin.<sup>2</sup> And such was the opinion of Blackstone.<sup>3</sup> In England, however, the weight of authority seems to be in favor of a construction of the statutes which would not materially, if at all, modify the common law. The statutes relieve from liability the person on whose land a fire "accidentally" begins. The English courts have been disposed to construe this as referring only to pure accidents, free from any culpable

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<sup>1</sup> *Beaulieu v. Finglam*, Year Book, 2 H. 4, f. 18, pl. 6, translated in 22 N. Y. 366.

<sup>2</sup> *Lansing v. Stone*, 37 Barb. 15.

<sup>3</sup> Bl. Com. 431.

negligence.<sup>1</sup> The difficulty in the way of this interpretation is, that the common law did not hold any one responsible in such a case, and, therefore, that the statutes would seem to be purposeless. Yet, under the rule that a statute in derogation of the common law is to be strictly construed, it is easy to interpret these statutes in such manner as to make them merely declaratory of the common law, inasmuch as they do not explicitly alter it.

§ 327 *a*. In New York, it is held that no one is liable for damage done to a neighbor's house by a fire which commenced on the land of the former, and by his negligence destroyed his own house, and spread to adjoining houses. The damage is deemed too remote to afford a ground of action.<sup>2</sup>

§ 328. One who purposely sets fire to any thing upon his own premises must certainly use ordinary care to avoid injury thereby to the property of another.<sup>3</sup> And it seems that by the common law every man was absolutely bound to keep fire, intentionally originated by him, within the limits of his own land, and was liable for any injury done by its escape, though he were entirely free

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<sup>1</sup> In *Vaughan v. Menlove* (3 Bing. N. C. 468; 4 Scott, 244), the defendant was held liable for the consequences of the spontaneous combustion of his hay, he having stacked it close to the plaintiff's cottages, and having been warned of its liability to take fire, and advised to take the rick down, to which he replied that "he would chance it." And though Lord Lyndhurst, in *Canterbury v. Attorney-General* (1 Phillips, 306), questioned the authority of this decision, on the ground that the statutes of Anne and George III. were not referred to, its doctrine has been reaffirmed by the Queen's Bench, which held that the statutes applied only to fires purely accidental (*Filliter v. Phippard*, 11 Q. B. 347). The case there presented to the court for decision, however, was not one of accidental fire in any sense, but of a fire purposely lighted by the defendant, though spreading by accident beyond his land. See, also, *Barnard v. Poor*, 21 Pick. 378; *Maull v. Wilson*, 2 Harrington, 443.

<sup>2</sup> *Ryan v. N. Y. Central R. Co.*, 35 N. Y. 210; but compare *Illinois Central R. Co. v. McClelland*, 42 Ill. 355, 360.

<sup>3</sup> *Filliter v. Phippard*, 11 Q. B. 347; 12 Jurist, 202; see *Scott v. Hale*, 16 Maine, 326.

from negligence.<sup>1</sup> But this rule has doubtless been modified by the statutes already referred to, and is certainly not law in any part of the United States.<sup>2</sup> It would, unquestionably, be culpable negligence to set fire to a building immediately adjoining the house of another person, or to start a fire in any place which a person of ordinary capacity could see was in dangerous proximity to another's property. One who uses a steam-engine on his own land ought to use the ordinary means for confining sparks, especially if he burns wood. The want of such precautions is certainly strong evidence of negligence; and if, for want of such precautions, the sparks set fire to a neighbor's property, the person using the engine is liable for the damage done.<sup>3</sup>

§ 329. The owner or occupant of land has a right to burn the fallow and wood thereon, for the purpose of bringing the land into cultivation, and is not liable for injuries caused to his neighbors thereby, without proof of some other act or default, or some other circumstance making the act itself negligent.<sup>4</sup> He must, however, in doing so, use ordinary care to avoid spreading the fire upon the land of others,<sup>5</sup> and it is at least an open

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<sup>1</sup> *Beaulieu v. Finglam*, 2 H. 4, f. 18, pl. 6; see *Fletcher v. Rylands*, Law Rep. 1 Exch. 265; 3 H. L. 330; *Jones v. Festiniog R. Co.*, Law Rep. 3 Q. B. 733.

<sup>2</sup> *Ryan v. N. Y. Central R. Co.*, 35 N. Y. 210; see § 329.

<sup>3</sup> *Teall v. Barton*, 40 Barb. 137.

<sup>4</sup> *Calkins v. Barger*, 44 Barb. 424; *Stuart v. Hawley*, 22 Id. 619; *Clark v. Foot*, 8 Johns. 421; *Fahn v. Reichart*, 8 Wisc. 255; *Hanlon v. Ingram*, 3 Iowa, 81; *Averitt v. Murrell*, 4 Jones [N. C.] Law, 323; *Miller v. Martin*, 11 Mo. 508; *DeFrance v. Spencer*, 2 Greene [Iowa], 462. In almost all of these cases, the defendant set fire to wood or stubble upon his land, in a dry season, and the wind blew it over to the plaintiff's premises. This was held not sufficient to establish negligence.

<sup>5</sup> *Hanlon v. Ingram*, 1 Iowa, 108; *Garrett v. Freeman*, 5 Jones [N. C.] Law, 78; *Dewey v. Leonard*, 14 Minn. 153. In *Hanlon v. Ingram*, the judge had charged that the defendant was liable only for *gross* negligence; and for this error the judgment was reversed. In *Garrett v. Freeman*, it appeared that logs were piled within five yards of the fence, with much combustible matter around, and a dead pine-tree be-

question, in some states, whether he is not bound to prove affirmatively that he took such care,<sup>1</sup> though it is generally held that the burden of proof in this respect rests upon the plaintiff.<sup>2</sup> The mere fact that the person thus making a fire did not keep a constant watch over it, does not tend to prove negligence.<sup>3</sup> And though it would be gross negligence thus to set fire to one's own wood, while combustible property of another person was lawfully on the premises, without giving the latter an opportunity to remove it,<sup>4</sup> yet if, after being distinctly warned of what is about to happen, he does not within a reasonable time remove his property (unless, of course, he has a right to keep it there against the landowner's will), the landowner may set his own wood on fire without being liable for any consequent injury to the other's property.<sup>5</sup> The same principles apply to any other case in which one makes a fire on his

tween the logs and the fence; that the weather was very dry, and a wind arising, the pine-tree caught fire, and fell across the fence, setting fire to the plaintiff's property. The judge charged that if there was no wind when the fire was started, the defendant was not negligent. Held, error, and judgment reversed.

<sup>1</sup> In *Turbervil v. Stamp* (1 Salk. 13), it was held that the burden of proof lay upon the defendant to show that he had not been negligent in his care of the fire lit by him. In *Hanlon v. Ingram* (3 Iowa, 81), Wright, C. J., says: "All of the circumstances should be carefully weighed; and, unless they disclose with reasonable certainty that in setting out the fire, and preventing its escape, the defendant has used those precautionary measures \* \* \* which, as a prudent and cautious man, he would with reference to his own property, they should hold him liable."

<sup>2</sup> *Tourtellot v. Rosebrook*, 11 Metc. 460; *Batchelder v. Heagan*, 18 Maine, 32.

<sup>3</sup> *Calkins v. Barger*, 44 Barb. 424. There it appeared that the defendant, in the early part of May, set fire to some log-heaps on his land, which were old and damp, and about a third of a mile from the plaintiff's barn. The land where the fire was set was damp, near a swamp and had been burned the year previous, and it had not rained for two or three weeks. The defendant left home that morning, and returned about two in the afternoon. While he was absent, the wind rose, and it blew a gale. The fire blew over some distance to the defendant's barn, which took fire and was consumed. Held, that if the defendant had no reason to apprehend any sudden change in the weather and the rising of the wind when he left home, he should not be held responsible for it: certainly not, without some proof that his presence there might have prevented the injury which occurred.

<sup>4</sup> *Jordan v. Wyatt*, 4 Gratt. 151.

<sup>5</sup> *Bennett v. Scutt*, 18 Barb. 347.



own land, for a lawful purpose, and the fire spreads upon other land. The person complaining thereof must affirmatively prove negligence, of which the fire itself is no evidence.<sup>1</sup>

§ 330. One who, either wrongfully or by want of ordinary care, sets fire to land which does not belong to him, is responsible for all the proximate consequences of his act, not only to the owner of the land upon which the fire begins, and to the owner of property upon that land,<sup>2</sup> but also to the owner of any other property which the fire may reach in its spread. Therefore, one who negligently starts a fire upon a prairie, or other wild lands, is liable for all property destroyed by the spread of the flames.<sup>3</sup> It is, however, often necessary to kindle a fire upon wild lands; and, therefore, the fact that such a fire was willfully kindled by a defendant, is not absolutely conclusive of his liability. It places upon him, no doubt, the burden of proving that he had good cause for firing the land; but, if this is proved, he is not liable for damage done, unless he failed to use ordinary care to prevent the spread of the fire.

§ 331. In Connecticut,<sup>4</sup> one who sets fire on any land is made liable by statute for all the consequences of its spreading in any way upon the land of another person. This statute does not apply to the case of a fire started by a person upon another's land, and not extending further.<sup>5</sup> Such a case is governed by the common law.

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<sup>1</sup> *Tourtellott v. Rosebrook*, 11 Mete. 460; *Batchelder v. Heagan*, 18 Maine, 32.

<sup>2</sup> But he may justify himself by showing that he lit the fire at a place and in a manner approved by the plaintiff (*Jordan v. Lassiter*, 6 Jones [N. C.] Law, 130).

<sup>3</sup> *Finley v. Langston*, 12 Mo. 120.

<sup>4</sup> Conn. Rev. Stat. [1866], 84, § 365, as construed in *Ayer v. Starkey*, 30 Conn. 204. The language of the statute is as follows: "Every person who shall set fire on any land, that shall run upon the land of any other person, shall pay to the owner all the damages done by such fire, to be recovered in an action of trespass."

<sup>5</sup> *Grannis v. Cummings*, 25 Conn. 165. It was there held that a fire started by

By a statute of North Carolina, one who willfully fires woods upon his land, is liable to an adjoining owner for injuries caused by such fire, unless he has given the latter written notice of his intention to do so at least two days before.<sup>1</sup> But this notice may be waived by the adjoining owner.<sup>2</sup> This statute does not apply to a firing of log heaps or trash collected on the land, but only to the firing of woods actually growing on the soil.<sup>3</sup> In Illinois,<sup>4</sup> on account of the devastating effects of the fire upon the prairies, all persons are absolutely prohibited, by statute, from firing woods or any thing upon the ground, except between March and November, and then only for the single purpose of protecting themselves from prairie fires. Under this statute, the burden is upon the defendant to prove that his fire was within the exceptions of the statute, and that he used every reasonable precaution to prevent injury to others.<sup>5</sup>

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A., upon certain land of B., which A. had a license to use for a specific purpose only, was not within the statute, though the fire extended to other land of B.

<sup>1</sup> "No person shall set fire to any woods, except it be his own property; nor in that case, without first giving notice in writing to all persons owning lands adjoining to the wood-lands intended to be fired, at least two days before the time of firing such woods, and also taking effectual care to extinguish such fire before it shall reach any vacant or patented lands near to or adjoining the lands so fired" (N. Car. Rev. Code [1855], 115, ch. 16, § 1).

<sup>2</sup> *Robertson v. Kirby*, 7 Jones [N. C.] Law, 477.

<sup>3</sup> *Averitt v. Murrell*, 4 Jones [N. C.] Law, 322.

<sup>4</sup> "If any person or persons shall, at any time hereafter, willfully and intentionally, or negligently and carelessly, set on fire, or cause to be set on fire, any woods, prairies, or other ground whatsoever, in the inhabited parts of this state, every person so offending, shall, on conviction, be fined, in any sum not less than five dollars. nor more than one hundred dollars: *Provided*, that this section shall not extend to any person who shall set on fire any woods or prairies adjoining his or her own farm, plantation, or inclosure, for the necessary preservation thereof from accident by fire, between the first day of March and the last day of November, by giving to his or her neighbors two days' notice of such intention: *Provided also*, that this section shall not be construed to take away any civil remedy which any person may be entitled to for any injury which may be done or received in consequence of such firing" (2 Ill. Gen. Stat. [1858], 402, § 158).

<sup>5</sup> *Johnson v. Barber*, 5 Gilm. 425; *Burton v. McClellan*, 2 Scam. 434.

§ 332. A railroad company, authorized by its charter to use steam power, has necessarily the right to use fire as a means of generating steam, and is not liable for injuries unavoidably produced by keeping fire for such a purpose.<sup>1</sup> One who seeks to recover on account of injuries caused to his property by sparks, smoke or coals escaping from a locomotive, the use of which is authorized by law, must therefore prove some negligence, apart from the mere fact of the injury,<sup>2</sup> and will certainly fail if the defendant shows that its servants adopted every known reasonable precaution against such accidents,<sup>3</sup> though the company will be liable therefor, if such precautions are not adopted.<sup>4</sup> It is not meant by this that the company will be thus liable, on simple proof that an invention was in existence, by the use of which the injury might have been prevented. It must appear that the invention had come into common use, and had been approved by experience.<sup>5</sup> But a special degree of caution must be used in running a locomotive

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<sup>1</sup> Therefore, where the plaintiff's injury was caused by the engine's coals being emptied upon the track, and this act was found to be necessary, and to have been carefully done, it was held that the plaintiff could not recover (*McCready v. South Carolina R. Co.* 2 Strobb. 356).

<sup>2</sup> *Aldridge v. Great Western R. Co.*, 3 Man. & G. 515. Where sparks from an engine set on fire some wood belonging to the railroad company, and the fire extended to the plaintiff's house, which was built close to the track, it was held that he could not recover without showing other negligence than was disclosed by these facts (*Macon &c. R. Co. v. McConnell*, 27 Geo. 481). In *Ryan v. N. Y. Central R. Co.* (35 N. Y. 210), it was held that no action would lie in such a case.

<sup>3</sup> *Rood v. N. Y. & Erie R. Co.*, 18 Barb. 80; *Vaughan v. Taff Vale R. Co.*, 5 Hurlst. & N. 679; reversing S. C., 3 Id. 743; *Reading R. Co. v. Yeiser*, 8 Penn. St. 366; *Frankford &c. Turnp. Co. v. Phil. & Trenton R. Co.*, 54 Id. 345; *Illinois Central R. Co. v. Mills*, 42 Ill. 407; *Burroughs v. Housatonic R. Co.*, 15 Conn. 124; per *Hubbard, J.*, *Sheldon v. Hudson Riv. R. Co.*, 14 N. Y. 218; *Baltimore &c. R. Co. v. Woodruff*, 4 Md. 242; *McCready v. South Carolina R. Co.*, 2 Strobb. Law, 356.

<sup>4</sup> *Huyett v. Reading R. Co.*, 23 Penn. St. 373; *Lackawanna &c. R. Co. v. Doak*, 52 Id. 379; *Bass v. Chicago &c. R. Co.*, 28 Ill. 9; *St. Louis &c. R. Co. v. Gilham*, 39 Ill. 455; *Illinois Central R. Co. v. McClelland*, 42 Ill. 355; *Fremantle v. London & Northwestern R. Co.*, 10 C. B. [N. S.] 89. And where the testimony on this, as to the value or necessity of particular improvements, is conflicting, the question must be left to the jury (*Ib.*)

<sup>5</sup> *Frankford &c. Turnp. Co. v. Phil. & Trenton R. Co.*, 54 Penn. St. 345.

through a town or village, where wooden buildings stand near the track. Under such circumstances, a railroad company is not excused by evidence of such vigilance as would be sufficient in passing through an open country.<sup>1</sup> A railroad company, not expressly authorized to use steam or other power involving the use of fire, is liable for the escape of sparks from its engines, irrespective of negligence.<sup>2</sup>

§ 333. In an action for damages upon injuries caused by sparks, &c., from a locomotive, the plaintiff must not only prove that the fire *might* have proceeded from the defendant's locomotive, but must show beyond a reasonable doubt that it did so originate.<sup>3</sup> But the origin of the fire being proved, it rests upon the defendant to show that he used all necessary precautions to avoid doing such mischief.<sup>4</sup> This at least is the rule which is supported by the

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<sup>1</sup> *Fero v. Buffalo &c. R. Co.*, 22 N. Y. 209; see *Great Western R. Co. v. Haworth*, 39 Ill. 346.

<sup>2</sup> *Jones v. Festiniog R. Co.*, Law Rep. 3 Q. B. 733. As to what language will confer this power, see *Moshier v. Utica &c. R. Co.*, 8 Barb. 427; *Bishop v. North*, 3 Railw. Cas. 459; *State v. Tupper*, Dudl. 135.

<sup>3</sup> *Sheldon v. Hudson River R. Co.*, 29 Barb. 226. In that case the plaintiff proved that his mill was sixty-seven feet from the railroad, and that a little more than an hour after the passage of a locomotive, emitting sparks, the mill was found to be on fire. This evidence was held insufficient to go to the jury. *Smith v. Hannibal & St. Jo. R. Co.* (37 Mo. 287) is to the same effect. In *Freemantle v. London & North-western R. Co.* (10 C. B. [N. S.] 89), however, a verdict on almost exactly such evidence was sustained. And when *Sheldon v. Hudson River R. Co.* was before the Court of Appeals on an earlier occasion (14 N. Y. 218), it was held that evidence, showing that the engines on the road in general issued sparks and coals of fire, was competent, and that, taken in connection with the facts proved in the case as reported in 29 Barb. 226, it would warrant a verdict for the plaintiff. See, also, *Lackawanna &c. R. Co. v. Doak*, 52 Penn. St. 379.

<sup>4</sup> *Bass v. Chicago &c. R. Co.*, 28 Ill. 9; *Illinois Central R. Co. v. Mills*, 42 Ill. 407; *Pigott v. Eastern Cos. R. Co.*, 3 C. B. 229; see *Ellis v. Portsmouth &c. R. Co.*, 2 Ired. [N. C.] Law, 138; *McCreedy v. South Carolina R. Co.*, 2 Strobb. 356, per Richardson, J. But apparently to the contrary, see *Reading R. Co. v. Yeiser* (8 Penn. St. 366; 2 Am. Railw. Cas. 325); *Field v. N. Y. Central R. Co.* (32 N. Y. 339, 349, per Davis, J.) Evidence that the fire came from the defendant's engine, and that the ordinary working of the engine would not produce such a result, is certainly sufficient proof of negligence (*Hull v. Sacramento &c. R. Co.*, 14 Cal. 387).

best authorities, and which seems to us to be just. The natural presumption would be that by the use of ordinary care engines could be constructed so as to avoid such consequences ; and if that is so, a presumption of negligence arises from their not being so constructed. But even where this doctrine has been denied or doubted, it is held that a presumption of negligence is raised by evidence that engines are, in common practice, so made as to retain their sparks. And if the particular engine from which the fire proceeded was so made, but it appears that, unless it was watched and kept in order, it would emit sparks, the inference may fairly be drawn that the fire was caused by negligence in its management.<sup>1</sup> Evidence that sparks and burning coals were frequently dropped by engines passing on the same road upon previous occasions, is relevant and competent to show negligence, and to make it probable that the plaintiff's injury proceeded from the same quarter.<sup>2</sup> So evidence that sparks have frequently been carried by the wind from the same railroad to the building finally destroyed, is competent to raise a presumption that its destruction was caused by such sparks on a later occasion.<sup>3</sup>

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<sup>1</sup> *Field v. N. Y. Central R. Co.*, 32 N. Y. 339. Whether the agents of a railroad company used due care in providing their engines with suitable spark-catchers, and in guarding against accidents by fire along the road, is for the jury to determine (*Huyett v. Phila. & Reading R. Co.*, 23 Penn. St. 373). In an action against a railway company for damages negligently caused by fire to the plaintiff's premises, alleged to have arisen from sparks emitted from their engines, the negligence alleged being in the omission of means to prevent the emission, and the means suggested being such as practical men stated would impede the engines, and would not be effectual for the object, it was left to the jury to say whether there were any means which the company ought to have adopted, and they having found that there had been no negligence on the part of the company as to using such means or in managing their engines, a verdict was directed in their favor (*Dimmock v. North Staffordshire R. Co.*, 4 Fost. & F. 1058). Where it appears that the company has used the best spark-catchers which are commonly in use, and which have been approved by experience, it has done all that can be required, even though superior chimneys have been invented (*Frankford &c. Turnp. Co. v. Phila. & Trenton R. Co.*, 54 Penn. St. 345).

<sup>2</sup> *Field v. N. Y. Central R. Co.*, 32 N. Y. 339 ; *Sheldon v. Hudson River R. Co.*, 14 Id. 218.

<sup>3</sup> *Piggott v. Eastern Counties R. Co.*, 3 C. B. 229 ; *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218.

§ 334. In some states, such as Maine,<sup>1</sup> Massachusetts,<sup>2</sup> and New Hampshire,<sup>3</sup> railroad companies are made, by statute, absolutely liable for injuries caused by fire proceeding from their engines, irrespective of their negligence. Under such statutes, a railroad company is liable for property burned by the spread of a fire originating from one of its engines, whether such property was actually touched by a spark from the engine or not,<sup>4</sup> and for any property thus injured, no matter how near to the railroad, if lawfully there.<sup>5</sup> In Maine, a railroad company which has leased its line to another company is liable under the statute for fire caused by engines belonging to the latter company. As these statutes authorize railroad companies to insure property exposed to the risks for which they are thus made responsible, the companies are liable for only such things as it is reasonably possible for them to insure, and not, therefore, for property only temporarily placed upon or near the road, which would be removed before it could be

<sup>1</sup> "When a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury, and it has an insurable interest in the property along the route, for which it is responsible, and may procure insurance thereon" (Me. Rev. Stat. [1857], ch. 51, § 38).

<sup>2</sup> "Every corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines; and shall have an insurable interest in the property upon its route for which it may be so held responsible, and may procure insurance thereon in its own behalf" (Mass. Gen. Stat. [1860], ch. 63, § 101).

<sup>3</sup> "The proprietors of every railroad shall be liable for all damages which shall accrue to any person or property by fire or steam from any locomotive or other engine on such road" (N. H. Gen. Stat. [1867], ch. 148, § 8). "Such proprietors shall have an insurable interest in all property situate on the line of such road, exposed to such damage, and may effect insurance thereon for their own benefit" (Id. § 9).

<sup>4</sup> *Hart v. Western R. Co.*, 13 Metc. 99; *Hooksett v. Concord R. Co.*, 38 N. H. 242. In the latter case, sparks from a locomotive set fire to a bridge belonging to the company, from which the fire spread to the plaintiff's bridge, and it was held that the latter could recover under the statute.

<sup>5</sup> *Ingersoll v. Stockbridge &c. R. Co.*, 8 Allen, 438; *Stearns v. Atlantic & St. Lawrence R. Co.*, 46 Maine, 95.

insured.<sup>1</sup> These statutes apply to all companies, whether previously or subsequently organized.<sup>2</sup>

§ 335. One who is exposed to the risk of injury from another's fire is undoubtedly bound to take customary and reasonable precautions to protect himself, but is under no obligation to do more than this. Thus, if a farmer sets fire to his field, the owner of an adjoining field cannot recover for injuries caused by the spread of the fire, if he contributed to bring it on his land by heaping dry stubble on the border of the other field, while it was on fire. And if the stubble was so placed before the fire commenced, the owner ought to remove it as soon as practicable after notice of the fire, and if he fails to do so, he should not be allowed to recover any greater amount of damages than he would have suffered, had he removed the stubble promptly. So if the plaintiff, or his servant in charge, saw fire approaching, and could have extinguished it before it reached his land, by the use of ordinary diligence, the plaintiff cannot recover from the person by whose fault the fire originated.<sup>3</sup> But unless the facts are undisputed, and the inference proper to be drawn from them unmistakable, the question is to be decided by the jury. The defendant is not guilty of contributory negligence by reason of leaving his land in its natural state,<sup>4</sup> or by making any legitimate use of his

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<sup>1</sup> *Chapman v. Atlantic & St. Lawrence R. Co.*, 37 Maine, 92. That was an action to recover the value of timber placed upon land adjoining the railroad, by consent of the owner of the land; and it was held that the company was not liable under the statute for its destruction. To the same effect is *Pratt v. Atlantic & C. R. Co.*, 42 Maine, 579.

<sup>2</sup> *Ingersoll v. Stockbridge & C. R. Co.*, 8 Allen, 438; *Pratt v. Atlantic & C. R. Co.*, 42 Maine, 579.

<sup>3</sup> *Illinois Central R. Co. v. McClelland*, 42 Ill. 355.

<sup>4</sup> Thus, one whose wood has been destroyed by fire proceeding from a passing engine, is not deprived of his remedy by the fact that he allowed underbrush and other combustible vegetation to remain there in a very dry season (*Vaughan v. Taff Vale R. Co.*, 3 Hurlst. & N. 743). This case was reversed on other grounds (5 H. & N. 679), but the plaintiff finally recovered his damages (see *Fremantle v. London & Northwestern R. Co.*, 10 C. B. [N. S.] 89).

property,<sup>1</sup> although his act makes the land much more liable to take fire than it would be under other circumstances. Such, at least, is the current of the best authorities. But leaving property in a condition which is unusual, and which increases its liability to danger, is contributory negligence.<sup>2</sup> In Ohio and Illinois, however, it has lately been adjudged that, where land adjoining a railroad is overrun with grass and weeds, which took fire from grass growing upon the track, the owner of such adjoining land is guilty of contributory negligence, and cannot recover.<sup>3</sup> If, with a knowledge of the danger to which his property is exposed, he neglects precautions against injury, it is for the jury to determine whether he was in fault in so doing.<sup>4</sup>

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<sup>1</sup> See *Fero v. Buffalo &c. R. Co.*, 22 N. Y. 209; *Cook v. Champlain Transp. Co.* 1 Denio, 91.

<sup>2</sup> Thus, leaving a house unfinished, without windows, near a railroad, is contributory negligence (*Great Western R. Co. v. Haworth*, 39 Ill. 346).

<sup>3</sup> *Ohio and Miss. R. Co. v. Shanifelt*, unreported.

<sup>4</sup> Whether, by leaving his door open, facing the railroad, with combustible material inside, the plaintiff was culpably negligent, is a question for the jury (*Fero v. Buffalo &c. R. Co.*, 22 N. Y. 209; *Ross v. Boston & Worcester R. Co.*, 6 Allen, 87). Denman, C. J., in a *nisi prius* case (*Hammon v. Southeastern R. Co.*, Walford on Railw. 183), intimated that it was negligence in the plaintiff to cover his barn with thatch instead of tiles; but this opinion cannot be supported, unless, indeed, the railroad company had paid for the expense. The plaintiff having a verdict in that case, the question was not raised in *banc*. In *Smith v. Hannibal & St. Jo. R. Co.* (37 Mo. 287), it was held to be a question for the jury whether, in allowing dry grass to be heaped by the wind on his own field, near the railroad, the plaintiff had been negligent, and that if the jury found that he had, he could not recover. In *Smith v. London & Southwestern R. Co.* (Law Rep. 5 C. P. 98), hedge trimmings, &c., were left in heaps near defendants' railway by their servants, for fourteen days, in very hot weather. A fire broke out in the heaps just after two trains had passed, and was carried by a high wind to plaintiff's house, two hundred yards distant. Held, that the question of defendants' negligence was properly left to the jury.



## CHAPTER XXI.

### GAS COMPANIES.

- Sec. 336. Duty in construction and manufacture.
- 337. Injuries from escape of gas.
- 338. Neglect to repair apparatus.
- 338 a. Contributory act of stranger.
- 339. Defense of contributory negligence.
- 340. Evidence of negligence.
- 341. Negligence of company's servants.
- 342. Liability for servants aiding customers.

§ 336. It is the duty of a gas company to build all its works, lay its pipes, and carry on its business, in such manner as to avoid injury to the property of others by the escape of gas, or of any of the materials employed in making it, or of the washings and refuse. For this purpose the company is bound to use a degree of care and skill proportioned to the danger which it is its duty to avoid.<sup>1</sup> It is not a sufficient excuse for a lack of the precautions necessary to avoid injury to the community, that such precautions are so expensive that the business cannot be carried on with profit if they are required. That is an argument which may be addressed to the legislature, but not to the courts. The common law holds the life and health of the community to be of far higher importance than commercial profit, or even than the diffusion of light. Nothing but the express authority of the legislature can justify the transaction of business in a manner detrimental to the public health. A mere general authority to carry on the business does not imply an authority to injure the public health for the sake of profit.<sup>2</sup>

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<sup>1</sup> *Hipkins v. Birmingham Gas Co.*, 6 Hurlst. & N. 250.

<sup>2</sup> See *Pottstown Gas Co. v. Murphy*, 39 Penn. St. 257.

§ 337. The most common instances of injury arising from gas works are the percolation of gas or refuse through the ground into adjoining land or water, the escape of noxious smells in the process of manufacture, and the leakage of gas from the pipes laid for public supply. Against all these dangers the company is bound to take especial precautions, since experience has shown that they are the inevitable result of the business when not managed with a degree of care and skill not usually required in ordinary trades or manufactures. The pipes ought to be of sufficient strength to bear all pressure that can reasonably be anticipated from the ordinary use of the streets under which they are laid,<sup>1</sup> and from the ordinary changes of weather to which they are exposed. And a failure to provide such pipes is culpable negligence on the part of the company. But the company is not bound to anticipate any unreasonable and extraordinary use of the streets, and to strengthen its pipes accordingly,<sup>2</sup> nor to prepare them for weather so extraordinary that it could not reasonably be expected to occur while the pipes lasted. If land in the vicinity of the pipes or works of the company is used for any purpose which is likely to expose them to any extraordinary peril, and the company has actual notice of the fact, or has information sufficient to put a prudent man upon inquiry, it must use all the precautions which, after full inquiry and investigation, appear to be necessary to protect the public against leakage consequent upon such peculiar use of the land.<sup>3</sup>

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<sup>1</sup> *Brown v. N. Y. Gaslight Co.*, Anth. N. P. 351.

<sup>2</sup> *Brown v. N. Y. Gaslight Co.*, Anth. N. P. 351; and see *Holly v. Boston Gaslight Co.*, 8 Gray, 123, 134.

<sup>3</sup> Where land adjoining the tank of a gas company was used for mining purposes, and by the gradual excavation of the land the tank cracked, and the refuse percolated into the plaintiff's well, it was held no defense that the tank was constructed so as to be perfectly tight when built, and not liable to break under any natural action of the

§ 338. The company is bound to repair defects in its apparatus, whether caused by its own fault or not,<sup>1</sup> and is liable to every one, except persons who contributed thereto, for injuries arising out of such defects. If the defect is not the result of any fault on the part of the company, its liability for non-repair does not commence until it has had notice of the defect, and reasonable time to repair it.<sup>2</sup> But in other cases the company is liable immediately, and without notice. It is the duty of the company to keep a sufficient force on hand to meet promptly all probable occasion for re-

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weather or the soil (*Hipkins v. Birmingham Gaslight Co.*, 6 Hurlst. & N. 250). In an action against a gas company for negligently allowing the escape of gas from their main into premises where lights were known to be burning, the case was, that the gas found entrance through an open window nearly level with the trench from the main for the insertion of the service pipe. Held, that even if the jury thought the gas so entered, it was a question for them whether the company's men might reasonably have foreseen it, and were bound to have the window closed (*Blenkiron v. Great Central Gas Consumers' Co.*, 2 Fost. & F. 437).

<sup>1</sup> See *Emerson v. Lowell Gaslight Co.*, 3 Allen, 410; *Holly v. Boston Gaslight Co.*, 8 Gray, 123.

<sup>2</sup> *Hunt v. Lowell Gaslight Co.*, 1 Allen, 343; S. C. again, 3 Id. 418. It was held in this case (1 Allen, 343; and see *Holly v. Boston Gaslight Co.*, 8 Gray, 123) that the company was not liable for damage occurring after the time within which the person injured by the leak could have found and moved into another house. This is an extraordinary doctrine. Would it be pretended that the company could be obliged to pay the expense of moving the plaintiff's goods, and the increase of rent which he would undoubtedly incur upon such a sudden removal? It might easily happen that by such a removal the plaintiff would subject himself to an increased rent for the whole of his life. To claim that this should be the measure of damages would be thought absurd. Is it any less absurd to require an injured person to subject himself to damage which he can never recover, as condition precedent to his recovering anything? Besides, under this rule, a gas company, by making the *whole* of Boston unhealthy, would escape liability to all its inhabitants, unless they emigrated *en masse* from the city before commencing their suits. A gas company is bound to keep up such a reasonable inspection of their mains and pipes as may enable them to detect when there is such an escape of gas, by fracture or imperfection of pipes, as may lead to danger of an explosion; and if an explosion takes place from a fracture or defect, which has existed for several days, during which time it has also been discoverable (by reason of the smell of the escaping gas), and would have been discovered by proper inspection, that is evidence of negligence on the part of the company; nor is it enough to relieve them from liability that, upon notice of the escape, they sent a workman to repair the defect, he arriving too late to do so (*Mose v. Hastings & c. Gas Company*, 4 Fost. & F. 324).

pairs ; but it is not required to anticipate any extraordinary demand upon its resources ; nor is it in fault if, by reason of circumstances which could not reasonably have been foreseen by a prudent man, its repairing force is not sufficient to meet at once all the demands that are made upon it.<sup>1</sup>

§ 338 a. If the apparatus furnished by a gas company is out of repair, the company will be liable for an injury arising partly from that cause, and partly from the negligence of a stranger. Thus, where gas escaped into the plaintiff's house from a defective pipe, and a gas-fitter took a lighted candle near the pipe to find where the leak was, the company was held liable for the explosion which ensued.<sup>2</sup> But the company will not be liable for the consequences of mismanagement by a stranger, if the apparatus is sound.<sup>3</sup>

§ 339. It is no defense, where an injury is proved to have been caused by the escape of gas or washings through the negligence of the company, to show that the injury was aggravated by other causes. That fact may limit the amount of damages, but does not relieve the company from all liability. Thus, where the gas escapes into a neighbor's well, the company is not exonerated by the fact that other causes added to the impurity of the water.<sup>4</sup> So, if gas escapes upon the land of a person who himself negligently creates a noxious gas, he may nevertheless recover for

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<sup>1</sup> *Holly v. Boston Gaslight Co.*, 8 Gray, 123.

<sup>2</sup> *Burrows v. March Gas Co.*, Law Rep. 5 Exch. 67.

<sup>3</sup> *Flint v. Gloucester Gas Co.*, 9 Allen, 552.

<sup>4</sup> *Sherman v. Fall River Iron Co.*, 5 Allen, 213. A declaration stated that the plaintiff was possessed of premises, that the defendant was employed in laying on gas to certain premises adjoining, and that he did the work so negligently that the gas escaped and ignited, and the premises adjoining the plaintiff's were set on fire and burnt. Held, that it was unnecessary to negative negligence in the owner of the adjoining houses in putting out the fire before it communicated to the plaintiff's premises (*Blenkiron v. Great Central Gas Company*, 2 Fost. & F. 437).

damage done by the gas entering upon his land, if its evil effects were not due to the mingling of the two gases.<sup>1</sup> And if the gas made by the injured party is lawfully and carefully made, and kept under proper control, he could, no doubt, recover even for damage caused purely by the mingling of the gases.

§ 340. The mere fact of the escape of gas, washings or refuse, from a place under the control of the company, is sufficient evidence to raise a presumption of its negligence ;<sup>2</sup> but the fact of such an escape from apparatus connecting with the property of the company, but not under its control, is not sufficient, especially if the apparatus is the property of the plaintiff. Nor will it alter the case to show that the company had access to the place where the escape occurred.

§ 341. The company is responsible for the negligence of its servants, not only in respect to its own works, but also in respect to all the details of its business. It is, therefore, liable for damage occasioned by such negligence in any work done by its servants with a view to its benefit, even though such work consist of repairs to property not belonging to the company. Thus, if the company's gas is escaping from a leak in a connecting pipe which does not belong to it, it is responsible for the negligence of its servant in attempting to stop the leak.<sup>3</sup>

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<sup>1</sup> Brown v. Illius, 27 Conn. 84.

<sup>2</sup> See Hipkins v. Birmingham Gaslight Co., 6 Hurlst. & N. 250.

<sup>3</sup> Lannen v. Albany Gaslight Co., 46 Barb. 264. In that case, it appeared that the defendant sent a servant to examine into the cause of a leak in the plaintiff's cellar. This servant entered the cellar with a light, and an explosion followed, which greatly injured the plaintiff. It seemed probable that the leak was in a pipe belonging to the owner of the house, and the defendant asked the court to charge that, if this was the fact, the defendant was not liable for the negligence of its servant in attempting to repair the pipe. The court refused to do so ; and its ruling was sustained on appeal, partly on the ground that the servant caused the damage while merely seeking to ascertain the *locality* of the leak, and partly on the ground stated in our text. The leak was below the meter, and the loss of the gas, therefore, fell entirely on the defendant. (See Burrows v. March Gas Co., Law Rep. 5 Exch. 67.)

§ 342. Any person has a right to inform a gas company of an escape of gas which is prejudicial to him, and, indeed, is in general so far bound to do so, that he cannot hold the company responsible for damage which he might have avoided by giving them notice.<sup>1</sup> By giving such notice, therefore, he does not assume any responsibility for the acts of persons whom the company may send to stop the escape, nor relieve the company of its responsibility therefor.<sup>2</sup> Such notice is not equivalent to a request for assistance, but rather a warning to save the company from loss.<sup>3</sup> Even if such a notice, when given by a customer while the gas is leaking at his expense (as it would be after having passed through the meter), is to be deemed a request for assistance to save him from loss, yet as the custom of all gas companies, and the positive rules of most, authorize such a request, it is to be presumed that such assistance will be rendered as part of the regular service of the company; and the servants employed therein are its servants exclusively. The company, therefore, is responsible both to its customer and to third persons for the negligence of servants sent pursuant to such request. And even an agreement on the part of the customer to pay for such services would not alter the case, so long as he paid the *company*, and not the servants, and the latter were under the control of the company.<sup>4</sup>

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<sup>1</sup> See *ante*, § 342.

<sup>2</sup> *Lannen v. Albany Gaslight Co.*, 46 Barb. 264.

<sup>3</sup> *Lannen v. Albany Gaslight Co.*, 46 Barb. 264.

<sup>4</sup> See *ante*, § 81.

## CHAPTER XXII.

### HIGHWAYS.

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- 345. Upon whom any obligation in respect to highways rests.
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- 351. Obligation of road and bridge companies.
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- 360. His obligation as to openings on the highway.
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- 362. Who is an "owner" within the rule.
- 363. Liability for wrongfully obstructing a highway.
- 364. Authorized obstructions.
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- SEC. 382. What constitutes a defect, &c., in a highway.  
383. Defects in the margins of highways.  
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392. Duty to light road at night.  
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394. Railroad crossing above grade.  
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399. Obligation to rebuild highways destroyed by the elements.  
400. Liability of municipal corporation for obstructions authorized by it.  
401. Liability for injuries caused jointly by defective highway and acts of third persons.  
402. Injuries caused conjointly by defect in road and in adjacent premises.  
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418. Unlawful weight of load.  
419. Action over by municipal corporations.  
420. Rule as to towns.  
421. Burden of proof.  
422. Damages recoverable.

§ 343. The term "highway" is a generic phrase, inclusive of all public ways, it being defined to mean a public road or thoroughfare which every person has a right to



use.<sup>1</sup> The term will therefore, include streets in cities,<sup>2</sup> footways or sidewalks,<sup>3</sup> turnpikes,<sup>4</sup> plank-roads.<sup>5</sup> and bridges.<sup>6</sup> These different kinds of highways are only distinguished from each other by the mode of their use, the material employed in their construction, or by the manner

<sup>1</sup> Angell on Highways, § 2; Kent's Comm. 32. There has been some discussion and variance of opinion as to whether to constitute a highway there must be a *thoroughfare*: in other words, "a way which is open to the public to pass through it" (see *Rex v. Lloyd*, 1 Campb. 260; *Rugby Charity v. Merryweather*, 11 East, 375, *n*; *Woodyer v. Hadden*, 5 Taunt. 138; *Wood v. Veal*, 5 Barn. & Ad. 454). In *Holdane v. Cold Spring* (23 Barb. 102; affirmed, 21 N. Y. 474), it was held, notwithstanding a dictum to the contrary, in *Higgins v. Tallmadge* (11 Barb. 457), that it was essential to a public right or public use of a road, that it should be a thoroughfare, or open at both ends. In the recent case, however, of *People v. Kingman* (24 N. Y. 559), the whole question was reviewed by Denio, J., with the conclusion that it is not essential to a highway, neither at common law nor under the statute of New York, that it be a thoroughfare. This is undoubtedly the English doctrine on the subject (see *Bateman v. Black*, 14 Eng. Law & Eq. 69).

<sup>2</sup> *Drake v. Hudson River R. Co.*, 7 Barb. 508; *Plant v. Long Island R. Co.*, 10 Id. 26; *Adams v. Saratoga & W. R. Co.*, 11 Id. 414; *Adams v. Rivers*, 11 Id. 390; *Livingston v. Mayor &c. of New York*, 8 Wend. 85; *Wyman v. Mayor &c. of New York*, 11 Id. 486; *Kelsey v. King*, 32 Barb. 410; *People v. Kerr*, 27 N. Y. 188; *Brace v. N. Y. Central R. Co.*, 27 Id. 269, 271; *Hamilton v. N. Y. & Harlem R. Co.*, 9 Paige, 171; *In re Fitzwater Street*, 4 Serg. & R. 106; *State v. Wilkinson*, 3 Verm. 480; *White v. Cincinnati*, 6 Peters, 432; 8 Id. 431.

<sup>3</sup> *Rex v. Salop*, 13 East, 95; *Logan v. Burton*, 5 Barn. & Cr. 513; *Allen v. Ormond*, 8 East, 4; *Drave v. Lowell*, 13 Metc. 292; *Brady v. Lowell*, 3 Cush. 121; *Wallace v. Mayor &c. of New York*, 2 Hilt. 440; S. C., 9 Abb. Pr. 40; *Providence v. Clapp*, 17 How. U. S. 161; see *Day v. Milford*,<sup>5</sup> 5 Allen, 98; *Hixon v. Lowell*, 13 Gray, 59.

<sup>4</sup> *Commonwealth v. Wilkinson*, 15 Pick. 175. In that case, Shaw, C. J., said: "We think that a turnpike is a public highway established by public authority for public use, and is to be regarded as a public easement. The only difference between this and a common highway is, that instead of being made at the public expense in the first instance, it is authorized and laid out by public authority, and made at the expense of individuals in the first instance, and the cost of construction and maintenance is reimbursed by a toll, levied by public authority for that purpose." See, also, *Buncombe Turnp. Co. v. Baxter*, 10 Ired. [N. C.] Law, 222; *Clarkville &c. Turnp. Co. v. Atkinson*, 1 Sneed, 426; *Louisville & N. Turnp. Co. v. Nashville &c. Turnp. Co.*, 2 Swan, 282; *Turnpike Road v. Brosi*, 22 Penn. St. 29; *Stormfeltz v. Turnp. Co.*, 13 Id. 555; *Sturtevant v. Co. of Plymouth*, 12 Metc. 7; *Mathews v. Winooski Turnp. Co.*, 24 Verm. 480; *Heath v. Barman*, 49 Barb. 496.

<sup>5</sup> *Fort Edward &c. Plank-Road Co. v. Payne*, 17 Barb. 567; *Benedict v. Goit*, 3 Barb. 459; *Plank-Road Co. v. Thomas*, 20 Penn. St. 91; *Plank-Road Co. v. Ramage*, Id. 95; *Plank-Road Co. v. Rineman*, Id. 99.

<sup>6</sup> See *ante*, § 246.

in which the expense of their construction and maintenance is defrayed. So railroads,<sup>1</sup> canals,<sup>2</sup> ferries,<sup>3</sup> and navigable rivers,<sup>4</sup> have been declared to be public highways. The public have likewise, a right to travel on the ice covering a public river; and one who cuts holes therein, near a waterway which has been used for twenty years, is liable in damages to a traveler injured thereby.<sup>5</sup> But the public have, at common law, no right of way along the margin of navigable rivers, except as acquired by express grant<sup>6</sup>

<sup>1</sup> See *Beekman v. Saratoga & S. R. Co.*, 3 Paige, 45, 74, per Walworth, Chancellor; and *Rex v. Severn & Wye R. Co.*, 2 Barn. & Ald. 646, per Holroyd, J.

<sup>2</sup> Angell on Highways, § 49. See *ante*, §§ 254-260. And a canal basin, for the lading and unlading of boats, is a highway (*Hart v. Albany*, 3 Paige, 213; *Barnet v. Johnson*, 2 McCarter [N. J.] 481). The towing path of a canal is a highway for the purpose for which it was constructed (per Bayley, J., *Rex v. Severn & Wye R. Co.*, 2 Barn. & Ald. 646, 648).

<sup>3</sup> Woolrych on Ways, 217; Wellbeloved on Highways, 33. See *Peter v. Kendall*, 6 Barn. & Cr. 703; *Gardner v. Green*, 8 Ala. [N. S.] 96; *Pomeroy v. Donaldson*, 5 Mo. 30; *Cohen v. Hume*, 1 Nott & McC. 19.

<sup>4</sup> *Scott v. Wilson*, 3 N. H. 331; *Moore v. Veazie*, 23 Maine, 343; *Georgetown v. Alexandria Canal Co.*, 12 Peters, 91; *Memphis v. Overton*, 3 Yerg. 389; *Hogg v. Zanesville Canal Co.*, 5 Ohio, 410; *Varick v. Smith*, 9 Paige, 547; *Lormon v. Benson*, 8 Mich. 18; *Moore v. Sanborne*, 2 Id. 519; *Browne v. Chadbourne*, 31 Maine, 9; *Treat v. Lord*, 42 Id. 552; *McManus v. Carmichael*, 3 Clarke, 1; *Rhode v. Otis*, 33 Ala. [N. S.] 578; *Stuart v. Clarke*, 2 Swan, 9; *Dalrymple v. Mead*, 1 Grant, 197; *Hart v. Hill*, 1 Whart. 136; *Wilson v. Blackbird Creek Co.*, 2 Peters, 245; *Post v. Mann*, 1 South, 61; *Morgan v. King*, 35 N. Y. 454; *Munson v. Hungerford*, 6 Barb. 265; *Gould v. Hudson River R. Co.*, 12 Id. 616; *Curtis v. Keesler*, 14 Id. 511; *Hart v. Albany*, 3 Paige, 213. But it does not follow from a river's being a highway, that land appropriated from its bed must remain a highway (*Wetmore v. Atlantic White Lead Co.*, 37 Barb. 70).

<sup>5</sup> *French v. Camp*, 18 Maine, 438.

<sup>6</sup> *Ball v. Herbert*, 3 T. R. 253; *Ledyard v. Ten Eyck*, 36 Barb. 102. It is otherwise by the civil law (Just. Inst. L. 2, tit. 1, § 4), which is adopted by the Code of Louisiana. It has been held in Illinois and Tennessee that the right of navigators was not limited to the bare privilege of floating upon the Mississippi, but included a right to land and fasten to the shore (*Middletown v. Pritchard*, 3 Scam. 520; *Godfrey v. Alton*, 12 Ill. 29; *Alton v. Illinois Trans. Co.*, Id. 38; *Memphis v. Overton*, 3 Yerg. 390). But in a recent case in Mississippi, it is held that the Mississippi river is not, above tide water, a navigable stream, in the technical sense of that term, and is in all respects subject to the rules of the common law regulating the rights of the public, and of riparian proprietors in fresh-water streams capable of being navigated (*The Magnolia v. Marshall*, 39 Miss. 109; and see *O'Fallan v. Daggett*, 4 Mo. 343). As to the rule in *North Carolina*, see *Lewis v. Keeling* (1

or prescription. Public piers,<sup>1</sup> or landing places,<sup>2</sup> are highways. Public squares, parks, &c., are within the legal definition of highways, and the principles and rules applicable to highways are equally applicable to them.<sup>3</sup> It does not fall within the scope of this chapter to speak of any other classes of highways than those popularly understood as coming within that designation, including common roads, streets, turnpikes, plank-roads, and bridges.<sup>4</sup>

§ 344. It has ever been deemed one of the first duties, as it is one of the principal powers, of the state, to provide safe and convenient means of travel and communication between the different parts of its territory. The construction and maintenance of highways are therefore matters of public concern; and such are the interests of the public therein, that to unskillfully build, or to encumber or obstruct a highway without authority, or to permit it to remain out of repair, are offenses against the public, which are reformable by indictment as public *nuisances*.<sup>5</sup> But a nuisance, technically so called, implies an indirect or general and impersonal injury, common to the community, and not a direct and immediate violation of the rights, or in-

Jones [N. C.] Law 299); in *Pennsylvania*, see *Baker v. Lewis* (33 Penn. St. 301); *Dalrymple v. Mead* (1 Grant, 197); in *Maine*, see *Treat v. Lord* (42 Maine, 552).

<sup>1</sup> *Wendell v. Baxter*, 12 Gray, 194; see *Radway v. Briggs*, 37 N. Y. 256; *People v. Lambier*, 5 Denio, 9.

<sup>2</sup> *Fowler v. Mott*, 19 Barb. 204. And in Vermont, pent roads are highways.

<sup>3</sup> "If a way is used for passing and repassing, and is common to all the people, it is a highway, whether it is called a road, street, or public square" (per Prentiss, C. J., in *State v. Wilkinson*, 2 Verm. 480; and see *State v. Atchison*, 24 Id. 459; *Commonwealth v. Fisk*, 8 Metc. 238; *Commonwealth v. Bowman*, 3 Penn. St. 203; *Watertown v. Cowen*, 4 Paige, 510; 2 Bishop on Crim. Law, § 1049).

<sup>4</sup> In the previous chapter on BRIDGES (*ante*, §§ 246-253), we have treated of those matters which relate peculiarly to bridges and have no application to other kinds of highways.

<sup>5</sup> The breaking up of the streets of a town, for the purpose of laying gas pipes without lawful authority, is a nuisance so serious and important that a court of equity will interfere by *injunction* to prevent it (*Attorney-General v. Cambridge Gas Consumers' Co.*, Law Rep. 6 Eq. Cas. 282).

jury to the person or property, of one man by another. The author of such a public wrong cannot be prosecuted by a private party unless he himself has suffered special injuries, to a greater extent than the rest of the community;<sup>1</sup> and, in that case, he has a remedy, by action for damages, against the author of the wrong. It is a general rule, that one who sustains a special and particular injury from an unlawful act prejudicial to the public, may maintain an action for his own special injury.<sup>2</sup> The remedy by action is not barred by the act of abating the nuisance.<sup>3</sup> The remedies are concurrent.<sup>4</sup>

§ 345. Inasmuch as negligence cannot be predicated of the acts of a person, in respect of any public work, unless the duty of doing the work is imposed upon him by law,<sup>5</sup> it will be necessary to ascertain the persons upon whom any obligation in respect to highways rests. A duty or obligation once fixed upon a party, involves a corresponding lia-

<sup>1</sup> *Huston v. Mayor &c. of New York*, 5 Sandf. 289; affirmed, 9 N. Y. 163; *Dougherty v. Bunting*, 1 Sandf. 1; *Henley v. Mayor &c.*, 5 Bing. 91; *McKinnon v. Penson*, 8 Exch. 319; *Greasley v. Codling*, 2 Bing. 263. See *post*, § 410.

<sup>2</sup> *Myers v. Malcolm*, 6 Hill, 292; *Duncan v. Thwaites*, 3 Barn. & Cr. 556; *Rose v. Miles*, 4 Maule & S. 101; *Henley v. Mayor &c. of Lyme Regis*, 5 Bing. 91; 3 Barn. & Ad. 77; 1 Bing. N. C. 222, and cases cited, *infra*.

<sup>3</sup> *Pierce v. Dart*, 7 Cow. 609.

<sup>4</sup> *Renwick v. Morris*, 7 Hill, 575; affirming S. C., 3 Id. 621. So held, on an indictment for public nuisance (*People v. Cunningham*, 1 Denio, 524). So held, in an action for damages (*Mills v. Hall*, 9 Wend. 315).

<sup>5</sup> *Esp. N. P. tit. Trespass on the Case*, 365; *Mayor &c. of Albany v. Cunliff*, 2 N. Y. 165; *Peck v. Batavia*, 32 Barb. 634; see *ante*, §§ 123, 124. An indictment against an individual for permitting a public bridge to become ruinous, must set forth how he became subject to the duty of making repairs (*State v. King*, 3 Ired. [N. C.] Law, 411). "It is not enough to show that the defendant has been guilty of negligence without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others" (per Willes, J., in *Gautrel v. Egerton*, Law Rep. 2 C. P. 371, 374). "Negligence alone will not do, unless some breach of duty is shown" (per Byles, J., *Collis v. Selden*, Law Rep. 3 C. P. 495, 498. And see *Winterbottom v. Wright*, 10 Mees. & W. 109; *Alton v. Midland Railway Co.*, 19 C. B. [N. S.] 213; *Southcote v. Stanley*, 1 Hurlst. & N. 247; *Gibson v. Mayor &c. of Preston*, Law Rep. 5 Q. B. 218).

bility to pay damages resulting from a neglect of such duty.<sup>1</sup>

§ 346. The duty of constructing and maintaining highways is, in this country, altogether a creation of the statute, each state of the Union having a highway system of its own, more or less differing in character and details from those of the others. The common law obligation of maintaining and repairing highways, which in England rests upon the parishes,<sup>2</sup> has no existence in this country. The obligation is wholly statutory, and where no such obligation is expressly or by necessary implication imposed by statute, no remedy for its violation can be had at the suit of a private party.<sup>3</sup> It is hardly necessary to remark that

<sup>1</sup> Wilson v. Jefferson, 13 Iowa, 181.

<sup>2</sup> Rex v. Great Broughton, 5 Burr. 2700; Rex v. Penderryn, 2 T. R. 513; Regina v. Scott, 2 Ld. Raym. 222; Rex v. Oxfordshire, 4 Barn. & Cr. 194; Rex v. Ecclesfield, 1 Barn. & Ald. 348; Rex v. Eastington, 5 Ad. & El. 765. A count, stating the defendant's liability to arise by virtue of an agreement with the owners of houses alongside of it, is bad; for the parish, who are *prima facie* bound to the repair of all highways within their boundaries, cannot be discharged from such liability by any agreement with others (Rex v. Liverpool, 3 East, 86). In England, no action lies against a parish vestry for damages resulting from an accident caused by the neglect to repair a highway within the parish, even though the vestry is empowered by law to make such repairs (Parsons v. St. Matthew's &c. Vestry, Law Rep. 3 C. P. 56).

<sup>3</sup> See *ante*, §§ 123-127. Morey v. Newfane, 8 Barb. 645. That was an action to recover damages sustained by a traveler whose horses, although driven skillfully, were thrown off the road, by reason of its ruinous condition, into a stream of water and drowned. It was insisted by the plaintiff that the common law duty of parishes in England was transferred to, and imposed upon, the towns of this country. But the court held otherwise. Selden, J., in delivering the opinion of the court, says: "There is no very close correspondence between the nature and object of the towns in this state and that of the parishes in England. While the former are exclusively political in their character, the latter were primarily ecclesiastical, and only incidentally political through the connection in England between the church and the government. \* \* \* Towns in this country do not succeed to the duty of repairing highways in consequence of any special correspondence between their nature, organization, and functions, and those of parishes in England; but if at all, it must be because by our statutes certain powers are given to, and certain duties imposed upon, towns, or rather upon their officers, in regard to roads, and because the making and repairing of roads is to a considerable extent accomplished through our town organizations." In *People v. Commissioners of Highways of Hudson* (7 Wend. 474), Nelson, J., in speaking of the obligation of the commissioners to repair, says: "I am satisfied that

the state itself, although possessing the supreme and sovereign control over all highways,<sup>1</sup> is never amenable to a private action founded upon an imputation of negligence. The duty of constructing and maintaining highways of various kinds is imposed by statute upon local communities, such as towns, counties, and cities, or upon public officers, or is assumed by private parties as a condition of the grant of a franchise, such as turnpikes, plank-roads, &c.

§ 347. In all of the New England States, and in Wisconsin, the several towns of the state are required to maintain

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neither the highway act nor the common law imposes this duty upon them or their towns." And in *Chidsey v. Canton* (17 Conn. 475), Waite, J., says: "The obligation resting upon towns in relation to the support of highways and bridges is not imposed by the common law, but is wholly the creature of the statute." In *Riddle v. Proprietors of the locks &c. of Merrimac River* (7 Mass. 160), Parsons, C. J., states the distinction between quasi corporations and corporations created by the corporations themselves; holding that the former are only liable to information or indictment for neglect of duty, while the latter are liable to a civil action also. In speaking of this case, Metcalf, J., uses this language (*Bigelow v. Randolph*, 14 Gray, 541): "This rule of law, however, is of limited application. It is applied in case of towns, only to the neglect or omission of a town to perform those duties, which are imposed on all towns, without their corporate assent, and exclusively for public purposes, and not to the neglect of those obligations which a town incurs when a special duty is imposed on it, with its consent, express or implied, or a special authority is conferred on it, at its request. In the latter cases, a town is subject to the same liabilities for the neglect of those special duties to which private corporations would be, if the same duties were imposed or the same authority were conferred on them—including their liability for the wrongful neglect as well as the wrongful acts of their officers and agents" (see *Eastman v. Meredith*, 36 N. H. 295; *Commonwealth v. Springfield*, 7 Mass. 9; *Mower v. Leicester*, 9 Mass. 247; *Reed v. Belfast*, 20 Maine, 246; *Davis v. Maynard*, 9 Mass. 242; *Ball v. Winchester*, 32 N. H. 435; *Hull v. Richmond*, 2 Woodb. & M. 337; *Commissioners v. Martin*, 4 Mich. 557; *Hill v. Board of Supervisors &c.*, 12 N. Y. 52; but see *Commonwealth v. Hopkinstown*, 7 B. Monr. 38; *Tallahassee v. Fortune*, 3 Florida, 19; *State v. Murfreesboro*, 11 Humph. 217).

<sup>1</sup> *People v. Kerr*, 27 N. Y. 188, 213; *State v. Mobile*, 5 Porter, 279; *Kelsey v. King*, 32 Barb. 410; *Plant v. Long Island R. Co.*, 10 Id. 26; *Adams v. Wash. & Sar. R. Co.*, 11 Id. 449; *Chapman v. Albany & Schen. R. Co.*, 10 Id. 362; *Transylvania University v. Lexington*, 3 B. Monr. 27; *In re Furman street*, 17 Wend. 649. In the city of New York by statute, the fee of streets, when opened, vests in the corporation in trust, from the time that the commissioners' report is confirmed (2 Rev. Laws, 414; see *In re Seventeenth Street*, 1 Wend. 252; *Drake v. Hudson River R. Co.*, 7 Barb. 509). As to the system in Kentucky, see *Augusta v. Perkins*, 3 B. Monr. 437.

their highways in a convenient and safe condition, and are declared to be liable in damages to any one who suffers injury through their neglect of such duty. In the other states the duty of building and maintaining roads and bridges is generally imposed upon independent public officers, elected for that purpose, or the duty is voluntarily assumed by incorporated cities and villages as one of their charter obligations. In Maine "highways, townways, and streets, legally established, are to be opened and kept in repair, so that they are safe and convenient for travelers with horses, teams, and carriages. In default thereof, those liable may be indicted, convicted, and a reasonable fine imposed therefor."<sup>1</sup> "If any person receives any bodily injury, or suffers any damages in his property, through any defect or want of repair or sufficient railing in any highway, townway, causeway, or bridge, he may recover for the same, in a special action on the case, of the county, town, or persons obliged by law to repair the same, if such county, town, or persons had reasonable notice of the defect or want of repair."<sup>2</sup> The statute of Massachusetts is as follows: "Highways, townways, streets, causeways, and bridges, shall be kept in repair at the expense of the town, city, or place, in which they are situated, when other provision is not made therefor, so that the same may be safe and convenient for travelers with their horses, teams, and carriages, at all seasons of the year." "If a town

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<sup>1</sup> Maine Rev. Stat. 1857, p. 224, ch. 18, § 37.

<sup>2</sup> *Ib.* p. 227, ch. 18, § 61. By the same section it is also provided that "if the life of any person is lost through any such deficiency, the parties liable to keep the same in repair, if they have reasonable notice of such deficiency, shall forfeit not exceeding one thousand dollars, to be paid to the executor or administrator of the deceased for the use of his heirs, to be recovered by indictment." In Maine, no town is liable for an injury from deficiency of a highway, "when the weight of the load, exclusive of the carriage, exceeds six tons. Proof of its weight is to be made by the plaintiff" (*Id.* p. 228, ch. 18, § 63). So in Maine, towns are punished by information for not *opening* public highways, as well as for not keeping them afterwards in repair (*State v. Kittery*, 5 Greenl. 254).

neglects to repair any of the ways or bridges which it is by law obliged to keep in repair, or neglects to make the same safe and convenient when encumbered with snow, such town shall pay such fine as the court in its discretion may order.”<sup>1</sup>

§ 348. In New Hampshire, “towns are liable for damages happening to any person, his team, or carriage, traveling upon a highway or bridge thereon, by reason of any obstruction, defect, insufficiency, or want of repair, which renders it unsuitable for the travel thereon.”<sup>2</sup> In Vermont, it is enacted, that, “if any special damage shall happen to any person, his team, carriage, or other property, by means of the insufficiency or want of repairs of any highway or bridge in any town, which such town is liable to keep in repair, the person sustaining such damage shall have the right to recover the same in an action on the case, in any court proper to try the same ; and if such damages shall accrue in consequence of the insufficiency or want of repairs of a bridge, erected and maintained at the expense of two or more towns, the action shall be brought against all the towns liable for the repairs of the same, and the damages and costs shall be paid by such towns in the proportions in which they are liable for such repairs ; and the court may, in its discretion, issue execution against each town for its proportion only : provided, that no person shall recover against any town or other cor-

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<sup>1</sup> Mass. Gen. Stat. 1860, p. 245, ch. 44, §§ 1, 24.

<sup>2</sup> N. H. Gen. Stat. 1867, p. 150, ch. 69, § 1. By section 1, ch. 68, it is enacted that “any town which neglects to make any new highway, or alterations in an existing highway therein, as laid out or altered, or to grade the hills in any highway therein as prescribed therefor, or to cause a dangerous embankment or causeway in such highway to be securely railed, or otherwise to keep any such highway in good repair, suitable for the travel thereon, shall be fined for such neglect ;” and by section 3, it is enacted that any town “which shall be found guilty, shall be fined in such sum as may be sufficient to pay the expense of putting the highway in repair, with incidental charges and costs.”



poration for any such damage, on account of the insufficiency or want of repairs of any highway, road, or bridge, which shall be sustained in consequence of the passing on such highway, road, or bridge, of any carriage bearing a load exceeding ten thousand pounds in weight.”<sup>1</sup> In Connecticut, it is enacted “that the several towns in this state shall make, build, and keep in good and sufficient repair, all the necessary highways and bridges within the limits of such towns, except where it belongs to some particular person or corporation to maintain such highways or bridges.”<sup>2</sup> The statute of Rhode Island is as follows: “All highways, townways, and causeways, and all bridges [except turnpikes, &c.], lying and being within the bounds of any town, shall be kept in repair and amended from time to time, so that the same may be safe and convenient for travelers, with their teams, carts, and carriages, at all seasons of the year, at the proper charge and expense of such town, under the care and direction of the surveyors of highways appointed by law.”<sup>3</sup> In Wisconsin, towns are made liable in damages for injuries “by reason of the insufficiency or want of repair of any bridge, or sluiceway, or road.”<sup>4</sup> The cases adjudged under these statutes are

<sup>1</sup> Vermont Gen. Stat. 1863, p. 200; ch. 25, § 41.

<sup>2</sup> Conn. Gen. Stat. 1866, p. 492, ch. 1, § 1. By section 6, it is provided that, “if any person shall lose a limb, break a bone, or receive any bruise, or bodily injury, by means of any defective bridge or road, the town, person, persons, or corporation, which ought to keep such road or bridge in repair, shall pay to the person so hurt or wounded just damages.” By section 7, it is provided that, “if any horse, or other beast, or any cart, carriage, or other property, shall receive any injury or damage, by means of any defective road or bridge, the town, person, persons, or corporation, which ought to keep such road or bridge in repair, shall pay to the owner of such beast, or property, just-damages.” In Connecticut, the statute imposing upon boroughs the duty of laying out and repairing highways was repealed in 1856 (see *Falls Village &c. Co. v. Tibbetts*, 31 Conn. 265).

<sup>3</sup> R. I. Rev. Stat. 1857, p. 122, ch. 44, § 1. By section 13 of the same statute, it is provided that “any town which shall neglect to keep in good repair its highways and bridges shall be fined not less than fifty dollars, nor more than five hundred dollars; and execution shall issue therefor against the town treasurer of such town.”

<sup>4</sup> Wisc. Rev. Stat. ch. 19, §§ 120, 121.

very numerous, and, though of local application, are valuable for the illustrations which they furnish of general principles applicable to the whole subject of highways.

§ 349. The duty of maintaining highways is often imposed upon municipal corporations, as one of the conditions of their charter; and when this is the case, such corporations are bound to exercise an ordinary and reasonable degree of care and vigilance, but nothing more, in the performance of such duty.<sup>1</sup>

§ 350. In the highway systems of most of the states outside of New England, the duty of maintaining roads and bridges is imposed upon certain town or county officers elected by the people, and variously designated as overseers, supervisors, surveyors, or commissioners of highways.<sup>2</sup> In some of the states, as in New York, they are

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<sup>1</sup> See *ante*, § 149.

<sup>2</sup> In *Alabama*, a remedy is given for injuries, sustained by reason of defects in highways, on the bond of the builders, or, in case of no bond, against the county (Code, § 1203). And the *corporate officers* of incorporated towns and cities are indictable for a misdemeanor, if streets are out of repair more than ten days (Code, § 1175). This statute refers as well to free as to toll bridges (*Barbour County v. Brunson*, 36 Ala. [N. S.] 362). In *Arkansas*, each overseer of roads must "cause all public roads in his district to be kept well cleared and in good repair" (Rev. Stat. ch. cxxx. § 12). In *California*, the road-master of each town must maintain the road "in as good repair as the means at his command will permit" (2 Gen. Laws, 6535, § 15). In *Delaware*, an overseer, willfully permitting any road or bridge to be out of repair, is deemed guilty of a misdemeanor and subject to a fine, provided that public funds for that purpose are in his power (Rev. Code, 178, § 32). In *Georgia*, overseers are to cause the roads to be well worked and repaired, and, for neglect to do so, are subject to fine, and action for damages at the suit of any person injured by such neglect (*Cobb's Geo. Stat.* 500, § 4; 504, § 6). In *Illinois*, each supervisor is "to cause all the public roads in his district to be kept well cleared, smooth, and in good repair," and, for failure to do so, is liable to indictment (1 Ill. Rev. Stat. 562, § 14). In *Indiana*, nearly the same statute exists. In the case of *Trustees &c. of White River v. Cottom* (11 Ind. 216), it was held that the statute of Indiana does not contemplate that suit shall be brought against a supervisor of highways for dereliction of duty upon the relation of any one. He may be indicted (see *Lynn v. Adams*, 2 Ind. 143; *State v. Hogg*, 5 Ind. 515). In *Iowa*, it is the duty of the supervisors to keep roads and bridges in repair, and, when notified in writing that any bridge or other portion of the public road is unsafe or impassable, the supervisor thus notified shall be liable for all damages resulting from the unsafe or impassable condition of the

compelled, under a penalty, to hold office when elected. Their duties are prescribed in general but comprehensive

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road or bridge, after a reasonable time (Iowa Laws, 144, § 902). In *Maryland*, supervisors are elected to superintend and direct repairs of the public roads, to remove all trees, trash, or gravel, lodged against bridges, and to fall all dead trees on each side of main roads; and, for neglect or malfeasance, they are liable to indictment and fine (1 Rev. Code, p. 610, §§ 1, 15, 17). In *Michigan*, the statute is nearly identical with that of New York (1 Comp. Laws, 340). In *Mississippi*, overseers of roads who refuse or neglect to keep roads and bridges in good repair, or let them remain out of repair ten days, except for sufficient cause, are subject to fine (Hutch. Miss. Code, 253, chap. 9, art. 7). In *Missouri*, overseers of highways are required to spend all the money coming into their hands in the repair of roads, and, for willful neglect to keep them in repair, or to put up finger-boards, &c., "shall be liable for the amount of damages caused by his neglect, after having notice," &c., or forfeit and pay a fine (Gen. Stat. 296, § 46). In *New Jersey*, overseers must "open, clear out, work, amend, repair and keep in good order the highways within their respective limits," and, for neglect or refusal, are liable to a penalty (Nixon's Digest, 706, §§ 21, 43). A township, or board of county freeholders, who are chargeable with the duty of rebuilding or repairing bridges, are liable in damages to one injured by their negligence in that regard, the judgment recovered to be paid by the township or county, as the case may be (Nixon's Dig. 74, § 18). In *New York*, it is made the duty of commissioners of highways to have the general supervision of highways and bridges within their respective towns, and to give directions to the overseers for the repair of the same, and as to the manner in which it shall be done (1 Rev. Stat. 501, § 1). The overseers are subordinate; their duties are to perform the injunctions of the commissioners, and they are made subject to penalty for refusal or neglect (1 Rev. Stat. 504). An overseer, however, is bound to remove obstructions, although not especially directed to do so by the commissioners (*McFadden v. Kingsbury*, 11 Wend. 667; see *Beach v. Furman*, 9 Johns. 229). In *North Carolina*, overseers, for neglect to keep roads and bridges clear and in repair, are subject to forfeiture, and "liable for such damages as may be sustained" (Rev. Code, 537, chap. 101, § 21). Under this statute, an overseer of public roads was held civilly liable for special damages for injuries arising from non-repair (*Hathaway v. Hinton*, 1 Jones [N. C.] Law, 243). But the justices of a county are not liable for defects in bridges under their control (*Kinsey v. Jones*, 8 Id. 186). In *Ohio*, supervisors are liable to fine for neglect to perform the duties of their office (2 Rev. Stat. 1316, § 40). In *Pennsylvania*, highways are to be kept effectually opened, and constantly kept in repair, and supervisors are indictable for neglecting to do so (Purdon's Dig. 875, § 41; *Dunlop's Laws*, 646, § 42; see *Edge v. Commonwealth*, 7 Penn. St. 275). In *Pennsylvania*, an action on the case will lie against a township to recover damages for an injury sustained by reason of the negligence of the supervisors of roads (*Dean v. New Milford*, 5 Watts & Serg. 545). In that case, the court remarked: "It is said that the duty of making, maintaining, and repairing roads is not thrown upon the township. But this is a mistake, for the road is their road; the expense of making and repairing it is thrown upon them, not, to be sure, in their collective capacity, for this would be inconvenient, but by means of the supervisors, who are their chief executive officers." In *South Carolina*, there is no particular penalty prescribed by the several road laws for the neglect of a commissioner to repair a road or bridge; but the courts have deemed it safest to adhere to the

terms, and, for violation of a prescribed duty, they are made subject to indictment or fine, and, in some of the states, to a civil action for damages. The general principles which determine the liability of such public officers for misconduct in the discharge of their official functions are fully stated in the chapter on PUBLIC OFFICERS; and it will not be necessary to recapitulate them in this place. It may be well to observe, however, that highway commissioners are not of common right bound to repair the roads under their charge.<sup>1</sup> Outside of the statute, by which their duties are prescribed, they have no authority, and are under no obligation to the public;<sup>2</sup> and when a highway is out of repair, they can take such measures only for repairing it as are pointed out by the statute.<sup>3</sup> They cannot repair a way at their own expense, and then call upon the public for an indemnity.<sup>4</sup>

§ 351. The foregoing remarks apply only to free public roads. As to turnpikes, plank-roads, and toll bridges, though they are owned and operated by private persons or corporations, they are, as already observed, public highways, which every person has the right to use, subject to the payment of a toll. In consideration of the right to

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penalty imposed by the act of 1825 (*State v. Chappell*, 2 Hill [S. C.] 391). In *Tennessee*, the corporation of a town may be indicted and fined for permitting the streets to remain out of repair, but the officers of the corporation are not individually responsible for such nonfeasance (*State v. Barksdale*, 5 Humph. 154; *Hill v. State*, 4 Sneed, 443). In *Virginia*, the surveyor must keep all roads cleared, smoothed of rock and obstructions, &c., and, for failure to do so, is subject to a fine of not less than five nor more than thirty dollars (*Gen. Stat. 1860*, p. 303, ch. 52, § 34).

<sup>1</sup> *State v. Halifax*, 4 Dev. [N. C.] Law, 345.

<sup>2</sup> *Austin v. Carter*, 1 Mass. 231. In Wisconsin, officers are not bound to build or repair bridges at their own expense, or under circumstances such that they cannot charge their towns with the expense (*Winslow v. Pleasant Prairie*, 16 Wisc. 613; see *Stat. of Wisc. 1866*, ch. 131).

<sup>3</sup> *Loker v. Brookline*, 13 Pick. 343.

<sup>4</sup> *Jones v. Lancaster*, 4 Pick. 149; *Wood v. Waterville*, 5 Mass. 294. In South Carolina, the whole board of commissioners, and not one alone, should be indicted, in case of neglect to repair their highways (*State v. Chappell*, 2 Hill [S. C.] 391; see *State v. Broyles*, 1 Bailey, 134).

collect such tolls, the proprietors of the road undertake to exercise ordinary care and diligence in keeping the road in such a state of repair that it may be traveled with safety to life and property.<sup>1</sup> Their want of funds is no excuse for a failure to keep the road in repair, so long as it is kept

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<sup>1</sup> *Townsend v. Susquehannah Turnp. Co.*, 6 Johns. 90; *Goshen &c. Turnp. Co. v. Sears*, 7 Conn. 86; see *Wilson v. Susquehanna Turnp. Co.*, 21 Barb. 68; *Bridge Co. v. Williams*, 9 Dana, 403; *Grigsby v. Chappell*, 5 Rich. Law, 443; *Parnaby v. Lancaster Canal Co.*, 11 Ad. & El. 223, 243. In the last case, it was held that a canal company, making a canal for their profit, and opening it to the public upon the payment of tolls, were bound at common law, "not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property." And the company were held liable to plaintiff, whose boat, in navigating the canal, ran foul of a sunken boat, and was damaged. *Tindal, C. J.*, placed the company's liability on the same principle which makes a shopkeeper, who invites the public to his shop, liable for neglect in leaving a trap-door open without any protection, by which his customers suffer injury. See also *Ward v. Newark & P. Turnp. Co.*, 1 Spencer, 323; *Davis v. Lamoille County Plank-Road Co.*, 27 Verm. 602. In the last case, *Redfield, C. J.*, said: "There is certainly a very important distinction between the liability of towns for damages accruing to travelers by reason of defects in the highways within their limits and that of turnpike and other corporations, who derive a revenue from the use of their roads by travelers. In the former case, the support of the road is a mere burden upon the towns, without any corresponding equivalent. The traveler pays no consideration for the use of the road. It is no advantage to the town to have the roads used by travelers. So that in this case there is, properly speaking, no privity, by way of a *quasi* contract, between the traveler and the town. In such case, it has been, with great propriety, held that the duty of the town to indemnify travelers for losses in consequence of defects in the highways, cannot be extended beyond the positive enactments of the statute. The duty of towns is, in such case, altogether statutory and of a public character, and, in the absence of special provision, there exists only the common remedy for similar neglects, by indictment. But in the case of corporations created for the purpose of maintaining a road for their own advantage, to be compensated by means of tolls, collectable of all who use the road, the case is very different. In such case, the liability to pay tolls is a consideration for the undertaking on the part of the corporation to furnish a safe road for the use of the traveler, as an equivalent. It is the same, in principle, as any other case, where service is performed for pay. There is an implied undertaking, resulting from the general rules of law applicable to similar subjects, that the person undertaking such service, whether it be a natural or artificial person, shall perform it faithfully, and, in case of failure, shall respond to the party thus paying his money, by way of damages, as an equivalent. Indeed, the liability of such corporations, as the defendants, is more analogous to that of a railroad which undertakes to carry for fare, which is but another name for toll, than to the liability of towns. And it was never doubted that railroads are liable for all damage accruing to travelers by reason of defects in their road or in its management."

open for travel.<sup>1</sup> In Massachusetts and Vermont, and perhaps in some other states, turnpike companies are made liable by statute for all damages happening to travelers from want of repair of their roads. Under such a statute, a turnpike company becomes an insurer of the safe condition of its road, and is responsible even for latent defects therein.<sup>2</sup> It has been held in Massachusetts that, under such a statute, the common law remedy by action for damages is taken away, and that the action can be maintained only by a person from whom toll is demandable.<sup>3</sup> But it is well settled that the common law remedies of indictment<sup>4</sup> and action on the case<sup>5</sup> are not taken away by a statute which imposes a penalty or fine for non-repair.

§ 352. The responsibility for the non-repair of a turnpike is sometimes, as in New York, placed by the act of incorporation upon the officers of the company. In a case where the charter of a turnpike company declared that every neglect to preserve the road in good repair should be deemed a misdemeanor in the president and individual directors for the time being of the company, the directors

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<sup>1</sup> *Waterford & Whitehall Turnp. Co. v. People*, 9 Barb. 161. The case was an indictment for non-repair of a turnpike. As to the defense of want of funds, the court say: "The want of funds affords no legal excuse to the defendants. By accepting their charter, they impliedly engaged to fulfill all the duties thereby imposed. A neglect of those duties subjected them to an indictment; and their poverty, as a corporation, is no more a defense than the poverty of an individual is a defense to an action for a breach of contract, or to an indictment for a crime."

<sup>2</sup> *Yale v. Hampden & B. Turnp. Co.*, 18 Pick. 357; see *Davis v. Lamoille County Plank-Road Co.*, 27 Verm. 602.

<sup>3</sup> *Williams v. Hingham Turnp. Co.*, 4 Pick. 341. In Vermont, it has been held that where, under its charter, a turnpike company was made liable to pay "all damages" happening to any person from whom toll was demandable, arising from want of repair of the road, the liability of the company was coextensive with that of towns (*Baxter v. Winooski Turnp. Co.*, 22 Verm. 114).

<sup>4</sup> *Susquehanna & B. Turnp. Co. v. People*, 15 Wend. 267; see *Waterford & W. Turnp. Co. v. People*, 9 Barb. 161; *People v. Goshen Turnp. Co.*, 11 Wend. 497.

<sup>5</sup> *Schuylkill Nav. Co. v. McDonough*, 33 Penn. St. 73.

were held severally, as well as jointly, liable to indictment.<sup>1</sup>

§ 353. The obligation to maintain a highway is frequently assumed by, or is imposed upon, private persons, who become responsible for any neglect of duty in that regard. One who legally contracts with the public authorities to keep in repair a highway, canal, or other public work, is liable to any one who is specially injured by his omission to perform his contract, or his negligent performance thereof.<sup>2</sup> The rules governing the liability of a contractor with the public for the negligent performance of a particular piece of work, causing an injury to a third person, have been already sufficiently stated.<sup>3</sup>

§ 354. More frequently in England than in this country the burden of repairing a highway is cast upon a particular person or corporation, by prescription or imme-

<sup>1</sup> *Kane v. People*, 8 Wend. 203; affirming S. C., 3 Id. 63. Walworth, Chancellor, said: "The refusal of one director to concur in a resolution directing the repairs, or in making the necessary appropriation for that purpose, may have been the cause of the road continuing out of repair, although all the other directors then in office were entirely innocent. It is no excuse, however, to one who has been guilty of a public offense, that others are equally guilty. \* \* \* *Prima facie*, every director is guilty of a neglect of duty in not joining with his associates in making the necessary provisions, and if any one has done his duty, but has been unable to effect the object, through the neglect or misconduct of others, he must show that fact on the trial." But it would seem that under such an act the directors are not individually liable, in addition to the fine, for the expenses of putting the road in repair (*Ib.*)

<sup>2</sup> *Phillips v. Commonwealth*, 44 Penn. St. 187; *Robinson v. Chamberlain*, 34 N. Y. 389; *Fulton Fire Ins. Co. v. Baldwin*, 37 Id. 648. In the last two cases, the defendant entered into a contract with the people of the state, through the canal board, to keep in good repair a section of the Erie canal. It was held that such contract inured to the benefit of every individual interested in its performance, and that the defendant was liable for damages occasioned by negligently permitting obstructions to the navigation of the canal to continue. These cases overrule, in effect, *Fish v. Dodge*, 38 Barb. 163.

<sup>3</sup> *Ante*, §§ 76-78, 182.

morial usage.<sup>1</sup> Where a manor is held by the service or tenure of repairing a common bridge or highway, every tenant is liable for its want of repair.<sup>2</sup>

§ 355. By the common law of England, if any part of a highway is inclosed by the owner of adjacent land, he is bound to keep in repair the whole of the highway opposite the part so inclosed.<sup>3</sup> This liability, however, attaches to the *occupant* of the lands inclosed, and not to the owner as such,<sup>4</sup> and does not attach at all where the inclosure is authorized by statute.<sup>5</sup> Private roads are repairable by those for whose exclusive accommodation they are laid out, or by those who use them.<sup>6</sup> In South Carolina, the

<sup>1</sup> *Regina v. Birmingham & Gloucester R. Co.*, 3 Q. B. 228; *Rex v. Ecclesfield*, 1 Barn. & Ald. 359; *Rex v. Hendon*, 4 Barn. & Ad. 628; *Rex v. Yorkshire*, 2 East, 253, *note*.

<sup>2</sup> *Regina v. Duchess of Buccleugh*, 1 Salk. 358. Where the lands charged are occupied by a person not the owner, such occupier is primarily responsible to the public for the repairs, but may demand reimbursement from the owner (*Baker v. Greenfield*, 3 Q. B. 148). If one merely removes an encroachment on a highway, and once repairs that part of the highway which was injured, he cannot be required to continue to repair (*Rex v. Skinner*, 5 Esp. 219). To an indictment against a parish for non-repair of a highway lying within it, a plea that the inhabitants of another parish have repaired, and been accustomed to repair, and of right ought to have repaired, was held bad, as it did not show any consideration (*Rex v. St. Giles*, 5 Maule & S. 260). But in a plea by the inhabitants of a county, that the inhabitants of a particular township have immemorially repaired the highway at the end of a county bridge situate within the township, it is not necessary to state any consideration for such prescription (*Rex v. West Riding of Yorkshire*, 4 Barn. & Ald. 623; but see *Rex v. Ecclesfield*, 1 Id. 348).

<sup>3</sup> *Duncombe's case*, Cro. Car. 366, as explained in *Regina v. Ramsden*, El. B. & El. 949. And see *Henn's case*, Sir W. Jones, 296.

<sup>4</sup> *Regina v. Ramsden*, El. B. & El. 949.

<sup>5</sup> *Rex v. Flecknow*, 1 Burr. 461; 3 Salk. 182.

<sup>6</sup> In general, no action can be maintained against towns for an injury happening on a road or way opened by individuals upon their own land, for their private use, though it has been traveled for a great number of years, if it has never, by any act of the owners and the selectmen of the town, been recognized as a public road (*Page v. Weathersfield*, 16 Verm. 424). So in Massachusetts, the liability is not affected by the fact that the road was originally wrought for the accommodation of the abutters. Thus, in an action to recover of a town damages sustained by a defect in a part of the highway, which has been so wrought and repaired by the town for public travel as to induce the public to pass over it, the town cannot introduce evidence



streets of villages, where they are not continuations of highways, are repairable by those who use them, and not by the public at large, they being considered merely private paths or neighborhood roads.<sup>1</sup> In New Hampshire, a road, although laid out for the accommodation of a single citizen, and subject to his right to place gates across it, is nevertheless repairable by the town, under the statute of that state.<sup>2</sup> But the town is not liable for the non-repair of the gates erected upon it. The individual for whose benefit they were built is bound to keep them in repair; and if he allows them to fall into decay, and cattle in consequence escape on adjacent land, he alone is liable for the damages.<sup>3</sup>

§ 356. No obligation rests upon the dedicator of a way to improve or repair it. The public, adopting a way dedicated to its use, must take it in *statu quo*.<sup>4</sup> Thus, where a highway was raised several feet above the level as it stood when the defendant's house was built, and the defendant bridged over the space between the highway and the upper story with gratings, which were used by the public as part of the highway, it was held that he was not liable for the non-repair of such gratings. It was the duty of the parish to keep them in repair.<sup>5</sup>

§ 357. So, where a highway, or any part of it, is per-

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that that part of the highway was originally wrought for the accommodation of the abutters (*Kellogg v. Northampton*, 8 Gray, 504).

<sup>1</sup> *Pope v. Commissioners &c. of St. Luke's*, 12 Rich. Iaw, 407. In Ohio, township roads, like private ways, must be kept in repair by those for whose benefit they were established (*De Forrest v. Wheeler*, 5 Ohio St. 286).

<sup>2</sup> *Proctor v. Andover*, 42 N. H. 348.

<sup>3</sup> *Proctor v. Andover*, 42 N. H. 362.

<sup>4</sup> *Robbins v. Jones*, 15 C. B. [N. S.] 221, 243; *Fisher v. Prowse*, 2 Best & S. 770.

<sup>5</sup> *Robbins v. Jones*, 15 C. B. [N. S.] 221. See *post*, § 360.

manently occupied by an individual for his own benefit, he assumes the duty of keeping the part so occupied in such a reasonable state of repair that travelers may safely pass over it. Thus, a railroad company which lays its track along a public street will be liable for the non-repair of so much of the street as it occupies. If it allows a hole to remain in the pavement between the rails,<sup>1</sup> or otherwise permits the road-bed to become unsafe, it is liable to a traveler for injuries sustained in consequence.<sup>2</sup> The primary obligation, however, is on the town, and the fact that an individual becomes bound to repair a highway will not absolve the town from its duty.<sup>3</sup> In case the in-

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<sup>1</sup> *Oakland R. Co. v. Fielding*, 48 Penn. St. 320. That was an action against a railroad company by a father to recover for injuries received by his son in running to a fire along the defendant's road-bed, which was a public street, by falling into a hole therein and being run over by the fire-engine. Held, that since the injury would not have occurred but for the hole in the road-bed, the defendant's negligence in suffering it to be there was a cause of injury sufficiently proximate to entitle the plaintiff to maintain his action. Williams, J., said: "It was the defendant's duty to keep the street in good repair, and they are primarily liable for an injury occasioned by the want of such repair. Whatever may have been the cause of the hole, if the defendants had notice of its existence, and knew that it rendered the street dangerous, it was their duty to repair it, or have it repaired; and if they failed in the performance of their duty in this respect, they are liable for the consequences of their negligence" (Ib.)

<sup>2</sup> A railroad company, having undertaken to lay down its track along a street which is a public road, is bound to lay it down properly, and to keep it in a proper condition; and where, by the sinking of the pavement, a spike in the rail was left exposed, with which the plaintiff's carriage coming in contact, the plaintiff was thrown out and injured, held, that the company was guilty of negligence, and the plaintiff might recover (*Fash v. Third Av. R. Co.*, 1 Daly, 148; see *Hutson v. Mayor &c. of New York*, 9 N. Y. 163; *Cook v. N. Y. Floating Dock Co.*, 1 Hilt. 486; see also the chapter on RAILROADS, *post*).

<sup>3</sup> The obligations imposed upon a railroad company by its charter, in respect to the construction of its railroad across public highways, do not absolve the town in which there is a highway, across which the railroad is located, from its duties and liabilities to the public (*Willard v. Newbury*, 22 Verm. 458; *Davis v. Leominster*, 1 Allen, 182; *Welcome v. Leeds*, 51 Maine, 313; *State v. Gorham*, 37 Id. 451; *State v. Dover*, 46 N. H. 452; *Batty v. Duxbury*, 24 Verm. 155). In Massachusetts, a town is not responsible for a defect or want of repair in a bridge, whereby a public highway passes over a railroad, the proprietors of which are bound by law to keep the bridge in repair (*Sawyer v. Northfield*, 7 Cush. 490). But in *Bacon v. Boston* (3 Cush. 174), it was held that the liability of a city or town, for an injury

jured party seeks redress from the town or city which is primarily liable to repair, the particular individual is liable to the town or city for the damages which it has been compelled to pay.<sup>1</sup>

§ 358. Where a lawful interference with the highway renders it necessary, for the convenience or safety of the public, that bridges, guards, or other structures should be erected, the party interfering is bound not only to provide them, but to maintain them so long as rendered necessary.<sup>2</sup> Thus, a company, lawfully cutting a canal across a highway, is bound to build and maintain a bridge, so as to preserve a passage. A water-power company, carrying a trench across a highway in such a manner as renders a bridge necessary for passage, may be compelled to erect and maintain such bridge.<sup>3</sup> Although the owner of the soil

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caused by a defect in a street or way, is not varied or discharged if the defect is occasioned by the exercise of the right of the adjoining owner of land to use the street or way for some private purpose not inconsistent with the right of the public.

<sup>1</sup> See *post*, § 419.

<sup>2</sup> A railroad company is required, if possible, to construct its road over or across highways without any inconvenience to the public; but if it cannot be done without some inconvenience, it must be done with the least possible inconvenience. If a bridge, or a substituted road, be necessary to prevent the obstruction, the railroad company must build it immediately, or in a reasonable time, and cannot delay it until the completion of the road (*Louisville & Nashville R. Co. v. State*, 3 Head, 523). Where a corporation had permission to lay a railroad track upon a county bridge, provided it should construct a convenient and substantial footway over the creek, held, that it was bound to *maintain* a footway (*Phoenixville v. Phoenix Iron Co.*, 45 Penn. St. 135). A railroad company is not liable, under a statute enjoining the duty upon railroads of making passes for accommodation of public travel, for not constructing a pass under a way, unless such way has been laid out agreeably to statute law, or been used by the public for at least twenty years (*Northumberland v. Atlantic & St. Lawrence R. Co.*, 35 N. H. 574).

<sup>3</sup> *Heacock v. Sherman*, 14 Wend. 58; see *Matter of Trenton Water-Power Co.*, *Spencer*, 659; *State v. Wilmington Bridge Co.*, 3 Harringt. 312; *Lawrence v. Great Northern R. Co.*, 16 Q. B. 643; *Rex v. Kent*, 13 East, 220; *Rex v. Lindsey*, 14 Id. 317. A mandamus will issue at the suit of towns, in which that part of a highway is situated over which a railroad has been extended, to compel the corporation to erect and maintain a bridge over such highway for public use, such obligation having been imposed by statute (*Cambridge v. Charlestown Branch R. Co.*, 7 Metc. 70; compare *Regina v. Southwestern R. Co.*, 15 Jur. 871).

over which a highway is laid out may not be guilty of trespass in digging a ditch across the highway and arching it with a bridge, he is bound to see that it does not become a nuisance by detracting from the safety of travelers,<sup>1</sup> and must therefore keep the bridge in repair.

§ 359. The owner of land adjoining a highway is bound to use ordinary care in maintaining his own premises in such a condition that persons lawfully using the highway may do so with safety. If he makes an excavation on his own land so near to a highway that a traveler thereon, accidentally slipping, falls into it, he is liable for the injuries which are thus sustained;<sup>2</sup> and although a passenger along the highway, in endeavoring to avoid the excavation, goes upon the excavator's land, that fact does not of itself bar his right of recovery.<sup>3</sup> But the owner of such land is not bound to take precautions against injury to persons straying from the highway, however innocently; nor is he at all restricted in the use of his land, except so far as it immediately adjoins the highway; nor is he bound to fence out travelers.<sup>4</sup>

§ 360. Where private premises are lawfully connected with the highway by passage-ways or vaults, open or covered, the owner must use ordinary care to cover or guard these openings in such manner as the terms of his license require, or ordinary prudence would dictate, and to use ordinary diligence to maintain such covers or guards in

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<sup>1</sup> *Hart v. Albany*, 9 Wend. 607; *Harlow v. Humiston*, 6 Cow. 191; *Lansing v. Smith*, 8 Id. 152; *Woodring v. Forks Township*, 28 Penn. St. 355.

<sup>2</sup> *Hadley v. Taylor*, Law Rep. 1 C. P. 53; *Barnes v. Ward*, 9 C. B. 392; *Robbins v. Jones*, 15 C. B. [N. S.] 221; *Vale v. Bliss*, 50 Barb. 358; see *Birge v. Gardiner*, 19 Conn. 507.

<sup>3</sup> *Vale v. Bliss*, 50 Barb. 358.

<sup>4</sup> *Hardcastle v. South Yorkshire R. Co.*, 4 Hurlst. & N. 67; *Howland v. Vincent*, 10 Metc. 371; *Binks v. South Yorkshire R. Co.*, 3 Best & S. 244; *Hounsell v. Smyth*, 7 C. B. [N. S.] 731.

good repair.<sup>1</sup> Where an area is excavated by the side of the street, it must be surrounded by a secure fence; and where an opening is made into a cellar, it must be covered with a lid or flap of ordinary and sufficient strength.<sup>2</sup> The want of such guards creates a public nuisance, for which the tenant is liable to any person injured thereby, even though the premises were leased in that condition.<sup>3</sup> If, by the act of a trespasser, and without fault on the part of the owner, the cover, fence, or guard is removed, or placed in a dangerous position, the owner is not liable until he has had actual or constructive notice of the fact, and has had reasonable opportunity to put it right.<sup>4</sup> If the opening is made without lawful authority, the owner is absolutely responsible for any injury ensuing therefrom, irrespective of the degree of care exercised by him, and even though the injury would never have happened but for the inter-

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<sup>1</sup> A tradesman who has a flap-door in the foot pavement of the street, opening into a cellar underneath his house, is bound, when he uses it, to conduct his business with such a degree of care as will prevent a reasonable person, acting himself with an ordinary degree of care, from receiving any injury from it (*Proctor v. Harris*, 4 Carr. & P. 337). He is also bound to take reasonable care that the flap is so placed and secured, as that, under ordinary circumstances, it shall not fall down (*Daniels v. Potter*, 4 Carr. & P. 262).

<sup>2</sup> *Coupland v. Hardingham*, 3 Campb. 398; *Daniels v. Potter*, 4 Carr. & P. 262.

<sup>3</sup> The occupier of a house, having an unfenced area fronting the street, cannot defend an action against him for neglecting to do so, by showing that when he took possession of the house, and as long back as could be remembered, the area was in the same open state as when the accident happened (*Coupland v. Hardingham*, 3 Campb. 398). The defendant A. was the owner of a house and lot, leased by him to B., and in front of which, in the sidewalk of the street, there was a large excavation, without a sufficient guard. While passing, the plaintiff, whose sight was somewhat defective, fell into this, and was injured. On a suit being brought against A. and the city, it was held that both the defendants were liable: the corporation, on the ground that, the excavation being in a highway, it was its duty to see that it was properly guarded in time of danger. Robertson, J., said: "The assumption by individuals of the right to make openings or inclose spaces on the highways as areas, although sanctioned by ordinances of the corporation, cannot alter the liability of the latter. Every illegal obstruction of the highway is a nuisance, and cannot be sanctioned by custom. The parts railed in continue to be parts of the highway until adverse possession has changed the encroachment into a title" (*Davenport v. Ruckman*, 10 Bosw. 20; affirmed, 37 N. Y. 568).

<sup>4</sup> *Daniels v. Potter*, 4 Carr. & P. 362.

ference of a trespasser with the cover.<sup>1</sup> Where a passage-way from the street to the adjoining premises becomes, by dedication, a part of the public footway, and is used as such by the public, the obligation of its repair is no longer upon the owner of the premises, but rests upon the public.<sup>2</sup>

§ 361. Some nice questions have arisen as to the relative liability of the owners and the actual occupants of the adjacent premises for the unsafe condition of passage-ways and areas opening upon the highway. It is clear that the owner is not liable for a nuisance not existing on the premises at the time of his lease of them to another.<sup>3</sup> It is equally clear that he cannot relieve himself from his liability by a demise of the premises and appurtenances to another, with a nuisance in existence. Such a demise merely adds another party, who is responsible for a continuance of the nuisance.<sup>4</sup> If the owner lets the premises

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<sup>1</sup> *Congreve v. Morgan*, 18 N. Y. 84; *Congreve v. Smith*, Id. 79.

<sup>2</sup> In 1830, houses were erected on land adjoining a new road constructed at a high level as an approach to a new bridge across the Thames. Between these houses and this road was a space which was covered over (as a means of access to the houses) by a flagging, in which were gratings to let light and air to the lower part of the buildings, which formed separate tenements, the entrance to which was upon the lower level in the rear. The space so covered had become, by dedication, a part of the public footway, and was used as such by the public. In 1862, in consequence of a large number of persons congregating upon the spot, the flagging and grating in front of one of the houses (having become weakened by use) gave way, and several persons were precipitated into the area below (a depth of about thirty feet), and one of them was killed. Held, in an action by his widow, that, there being, under the circumstances, no legal liability on the part of the lessee of the houses to keep the surface of this way in repair, the action was not maintainable, the gulf at the side of the causeway being the result of the road being raised by the makers of it, not by the land at the side being excavated by the proprietors of it; and that the artificial character of the flagging and grating did not make it more or less a way to be repaired by the parish (*Robbins v. Jones*, 15 C. B. [N. S.] 221).

<sup>3</sup> *Owings v. Jones*, 9 Md. 108. See *Russell v. Shenton*, 3 Q. B. 449.

<sup>4</sup> The owner of real property in a city, who makes a coal vault, under the sidewalk opposite the premises, for his own convenience, is not relieved from liability for injuries received by a citizen who, in passing over it with ordinary care, falls through an insecure circular grating leading to such vault, although he has demised the prem-

with the nuisance upon them, and the tenant occupying the premises allows the nuisance to remain, they are jointly as well as severally liable for injuries occasioned thereby;<sup>1</sup> for every continuance of the nuisance is, in judgment of law, a fresh nuisance.<sup>2</sup> But if there is only

ises to a tenant who had been for several years, and then was, in possession of the premises, and although there was some evidence to show that, at the time of the accident, such grating was left out of place by the tenant, who had just previously used it (*Anderson v. Dickie*, 1 Robt. 238; S. C., 26 How. Pr. 105). In that case, which was an action against the owner, the judge charged the jury: "1. That the law imposed upon the owner of property in a city, who used any part of the street for his private purpose, the duty of employing all necessary and proper means for the prevention of damages and injury that might arise from the use of such public street by him, and he is responsible for all injury resulting from the street being made thereby less safe for its proper uses, when there is no negligence on the part of the party injured. 2. If the grating was insecure at the time of the happening of the accident in question, and that was occasioned by the negligence of the defendant, he is liable in this action; for, being the owner of property, he was bound to see that the grating was kept securely. 3. If the jury are satisfied that, without the chain and bar, the grating was entirely secure, and secure from liability to cause accidents to persons passing over it, the defendant was not guilty of negligence. 4. If the defendant did not resort to all necessary and proper means to render the grating secure, and its insecurity had existed and continued for a considerable time previous to this action, he is liable. 5. The law is answered by a landlord's using reasonable diligence, at the time of letting the property, to see that it is in good condition. 6. The defendant would not be liable if the grating had been secured by him previously, and the security had been removed by the tenant or any one else." The charge was sustained. In *Davenport v. Ruckman* (37 N. Y. 568; affirming S. C., 10 Bosw. 20), the defendant was the owner of the house, and had allowed a cellar-way to become and to remain in a dangerous condition. He had recently sub-let the premises, but they were in a dangerous condition when he put his tenant into possession, and the accident occurred thereafter. It was held, that the letting of the premises did not relieve the owner from liability. It simply added another party to the negligence. As between those parties, the owner was the principal.

<sup>1</sup> *Irvin v. Fowler*, 5 Robertson, 482; 4 Id. 138.

<sup>2</sup> *Vedder v. Vedder*, 1 Den. 257; *Waggoner v. Jermaine*, 3 Id. 306; *Conhocton Stone Co. v. Buffalo, N. Y. & Erie R. Co.*, 52 Barb. 390; *Brown v. Cayuga & S. R. Co.*, 12 N. Y. 486; *Rex v. Stoughton*, 2 Saund. 158, note; *Rex v. Kerrison*, 3 Maule & S. 526; *State v. Yarnell*, 12 Ired. [N. C.] Law, 130; *Fish v. Dodge*, 4 Den. 311; *Stapple v. Spring*, 10 Mass. 74; *Hubbard v. Russell*, 24 Barb. 404. "The receipt of rent is an upholding and continuing of the nuisance" (per Denman, C. J., *Rex v. Pedley*, 1 Ad. & El. 826). In *Coupland v. Hardingham* (3 Campb. 398), it was held, that the occupier of a house was bound to rail in the area, and it was no defense that the premises had been in the same situation for many years before the defendant (the occupier) came in possession of them (see *Rosewell v. Prior*, 12 Mod. 635; *Daniels v. Potter*, 4 Carr. & P. 266; *Blunt v. Aiken*, 15 Wend. 522). At common law, the writ of nuisance lies only against the party who erected the nuisance, and, if it be continued

a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable.<sup>1</sup> It has been held, in a case where the tenant had surrendered the premises to the landlord for a brief period, to enable him to make repairs, that the tenant was not liable, because he was not in possession at the time, and that the landlord was liable, without reference to his liability as owner, for the reason that he was then in possession.<sup>2</sup>

§ 362. By "owner" is not meant merely the person who is vested with the fee of the premises. Any one who stands in the relation of landlord to the person who actually occupies the premises is the owner within the rule stated. The successor to the title and possession of the property with a nuisance upon it is liable for damages caused by its continuance.<sup>3</sup> Thus, a purchaser of the reversion<sup>4</sup> during a tenancy, or of a leasehold estate,<sup>5</sup> with a nuisance upon the land, though he cannot enter to remove it, is liable for the special injuries it may cause. In case the premises are vacant, as where lands adjoining a highway had been sold

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by his alienee, against both; but it does not lie against the alienee alone for continuing the nuisance (*Brown v. Woodworth*, 5 Barb. 550).

<sup>1</sup> *Rex v. Pedley*, 1 Ad. & El. 822.

<sup>2</sup> *Leslie v. Pound*, 4 Taunt. 652.

<sup>3</sup> *Brown v. Cayuga & Susq. R. Co.*, 12 N. Y. 486; *Vedder v. Vedder*, 1 Denio, 257, 261; *Woodring v. Forks Township*, 28 Penn. St. 355. As to whether notice to abate is necessary, see same cases, and *Hubbard v. Russell*, 24 Barb. 404; *Conhocton Stone Co. v. Buffalo, N. Y. & Erie R. Co.*, 52 Barb. 390; *Norton v. Valentine*, 14 Verm. 239; *Johnson v. Lewis*, 19 Conn. 303; *Beavers v. Trimmer*, 1 Dutch. 97. In Maine, Vermont, Connecticut, and Massachusetts, it is held that a grantee or tenant for years is not liable for keeping a nuisance as it was before he came into the estate, if he has had no notice to remove it, nor done any new act which is itself a nuisance (*Dodge v. Stacy*, 39 Verm. 560; *Johnson v. Lewis*, 13 Conn. 303; *Pillsbury v. Moore*, 44 Maine, 154; *McDonough v. Gilman*, 3 Allen, 264). A tenant at will was held liable to repair a house which projected over a public bridge (*Regina v. Watson*, 2 Ld. Raym. 856).

<sup>4</sup> *Rex v. Pedley*, 1 Ad. & El. 827, per Littledale, J.; *Irvin v. Fowler*, 5 Rob. 482.

<sup>5</sup> *Davenport v. Ruckman*, 10 Bosw. 203; 37 N. Y. 568.



by parol, and the purchaser, after having been put in possession, had subsequently quit the premises and left them vacant, the possession will follow the legal title, the owner of which is liable for accidents caused by want of repair.<sup>1</sup> It has been held that an executor is not liable for a nuisance made by the testator in a highway,<sup>2</sup> though perhaps an *heir* is.<sup>3</sup>

§ 363. We have spoken of the obligations of individuals to repair either the whole or parts of highways, and to maintain the premises adjacent thereto. We shall now refer to the liability of individuals for unlawfully obstructing a highway. All obstructions of a highway are not public nuisances. Only such as are made without license of the proper authorities can be so designated.<sup>4</sup>

<sup>1</sup> Grier v. Sampson, 27 Penn. St. 183. See Wright v. Freeman, 5 Harr. & J. 467.

<sup>2</sup> Hawkins v. Glass, 1 Bibb, 246.

<sup>3</sup> "It seemeth that an *heir* may be indicted for continuing an encroachment or other nuisance on a highway begun by an ancestor, because, such a continuance of it amounts, in the judgment of law, to a new nuisance" (1 Hawk. P. C. ch. 76, § 15). But in Austin's case (1 Ventr. 183), in an indictment for *erecting* posts and rails in a highway, it was held necessary to prove that the party indicted set them up.

<sup>4</sup> The legislature, being entirely competent to declare the uses to which highways may be appropriated, and to impart to municipal corporations or others both permissive and restraining powers over the subject, may legalize that which would otherwise be a nuisance. And that which the legislature constitutionally (Leigh v. Westervelt, 2 Duer, 618) authorizes, as the erection of a dam on a navigable river (Harris v. Thompson, 9 Barb. 350), or building a railroad (People v. Kerr, 27 N. Y. 188, 210; Williams v. N. Y. Central R. Co., 18 Barb. 222, 247; Milhau v. Sharp, 15 Id. 193; Plant v. Long Island R. Co., 10 Id. 26; Chapman v. Albany & Schenectady R. Co., Id. 360; Adams v. Saratoga & W. R. Co., 11 Id. 414; Baptist Church v. Utica & Schenectady R. Co., 6 Barb. 313; Lexington & O. R. Co. v. Applegate, 8 Dana, 289; Bloodgood v. Mohawk & H. R. Co., 18 Wend. 1; Fletcher v. Albany & S. R. Co., 25 Id. 462; People v. Saratoga & Rensselaer R. Co., 15 Id. 113; Mohawk v. Utica & S. R. Co., 6 Paige, 554; Hudson & Del. Canal Co. v. N. Y. & Erie R. Co., 9 Id. 323; Hamilton v. N. Y. & Harlem R. Co., Ib. 171; Wilson v. Black Bird Cr. Marsh Co., 2 Peters, 245; Hentz v. Long Island R. Co., 13 Barb. 646; Rex v. Pease, 4 Barn. & Ad. 30; Rex v. Morris, 1 Id. 441; Williams v. Wilcox, 6 Ad. & El. 314), or sewer (Brooks v. Boston, 19 Pick. 174) in a public street, cannot be a nuisance *per se*. If, however, there is any excess or irregularity in the exercise of the power conferred, it becomes a public nuisance *pro tanto* (Renwick v. Morris, 3 Hill, 621; affirmed, 7 Id. 575). The construction of a railroad across a highway, without proper authority, is an obstruction for which the company building it is indictable (Commonwealth v. Nashua &

In a case of an unauthorized interference with a highway, no question of negligence arises.<sup>1</sup> The existence of the nuisance, and the injury therefrom to a person using ordinary care on his part, are sufficient to sustain an action against the author of the nuisance. It is an old and well-settled rule that whoever, without special authority, materially obstructs a highway, or renders its use hazardous, is liable in an action by any one who sustains a special injury thereby.<sup>2</sup> Thus, one who digs a ditch, or lays logs or other material upon it, though but for temporary convenience,<sup>3</sup> or blocks up a street an unreasonable time in loading or unloading goods,<sup>4</sup> or in plying for pas-

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Lowell R. Co., 2 Gray, 54; Commonwealth v. Vermont & Mass. R. Co., 4 Gray, 22; Commonwealth v. Old Colony & F. River R. Co., 14 Gray, 93; Commonwealth v. Erie & Northeast R. Co., 27 Penn. St. 339).

<sup>1</sup> In an action against a railroad company for damages incurred by reason of its having interfered with a highway, negligence or want of skill in the defendants is not material (Robinson v. N. Y. & Erie R. Co., 27 Barb. 512). It is no answer to an action for an unlawful obstructing of a highway that the defendant opened a way through which travel might pass (Weathered v. Bray, 7 Ind. 706).

<sup>2</sup> Dygert v. Schenck, 23 Wend. 446; Congreve v. Smith, 18 N. Y. 79; Congreve v. Morgan, 5 Duer, 495; Hart v. Albany, 9 Wend. 607; Harlow v. Humiston, 6 Cow. 191; Lansing v. Smith, 8 Cow. 152; Heacock v. Sherman, 14 Wend. 58; Rex v. Pedley, 6 Carr. & P. 292; Barnes v. Ward, 9 C. B. 392; Commonwealth v. King, 13 Metc. 115; Baltimore v. Marriott, 9 Md. 160; Silvers v. Nerdlinger, 30 Ind. 53. A gas company employed B. to lay down gas pipes in the streets of Sheffield, which it had no right to do, and in consequence of stones and earth left on the street by B., and no sufficient light by night, plaintiff was injured. Held, that the company was liable for the negligence of B., as the contract into which it had entered was illegal (Ellis v. Sheffield Gas Consumers' Co., 2 El. & Bl. 767).

<sup>3</sup> Dygert v. Schenck, 23 Wend. 446; Bliss v. Schaub, 48 Barb. 339; Harlow v. Humiston, 6 Cow. 289; Bush v. Steinman, 1 Bos. & Pul. 404; Burgess v. Gray, 1 C. B. 578; Rogers v. Rogers, 14 Wend. 131; Mould v. Williams, 5 Q. B. 469. The defendant left his cart, loaded with wood, before his house in the evening. Next morning it was found some distance off in the road, upset by some unknown means, and forming a dangerous obstruction. Defendant, being aware of this, suffered it to remain in that condition for two or three days, and during that time the plaintiff, traveling at night along the road, drove over the obstruction, was upset and badly injured. Held, that the defendant, having knowingly and willingly permitted his property to remain where it was so placed, was liable to the plaintiff for the injuries he sustained thereby (Linsley v. Bushnell, 15 Conn. 225).

<sup>4</sup> People v. Cunningham, 1 Den. 524; Northrop v. Burrows, 10 Abbott Pr. 365; Rex v. Russell, 6 East, 427; Rex v. Jones, 3 Campb. 230.

sengers,<sup>1</sup> or does any thing which renders the highway less commodious or safe for the traveler, is liable for the consequences.

§ 364. Where one has a license to interfere with a highway, as where a railroad company is authorized to lay its track along, under, or over a highway, the terms of the license, so far as it directs the manner of such interference, must be strictly complied with. Not to do so is a public nuisance.<sup>2</sup> Thus, where a railroad company was authorized by its charter to raise or lower any highway which the railroad might pass, so that, if necessary, the latter might pass over or under or across the highway, the company will not be justified in widening a highway, or diverting its course, or supplying its place with a new way, so that the railroad would be passed at a different point from its intersection with the original way, even though the change was for the convenience of the public; and one who has suffered special damages by such a diversion of the way may recover against the company.<sup>3</sup> So

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<sup>1</sup> *Rex v. Cross*, 3 Campb. 224. It is a public nuisance to suffer a highway to be incommoded by reason of the foulness of the adjoining ditches, or by boughs of trees hanging over it (1 Hawk. P. C. c. 75, § 9; c. 76, § 146), or to suffer a house standing upon the highway to be ruinous (3 Bac. Abr. Highways, E.; 10 Petersd. Abr. 340, *note*), or to carry an unusual weight with an unusual number of horses (*Rex v. Egerly*, 3 Salk. 183), or to erect a gate across a highway, though opening and shutting freely (3 Com. Dig. Tit. Chimin, A. 3; see *Wetmore v. Tracy*, 14 Wend. 250; *Peckham v. Henderson*, 27 Barb. 207).

<sup>2</sup> The obstruction of a highway by the construction of a railroad across it in a manner not authorized by law is a nuisance, and renders the corporation liable to indictment (*Commonwealth v. Nashua & Lowell R. Co.*, 2 Gray, 54; *Commonwealth v. Vermont & Mass. R. Co.*, 4 Gray, 22; *Commonwealth v. Erie & Northeast R. Co.*, 27 Penn. St. 339). It seems that the *leveling* of a street, preparatory to laying the structure of a railway, is not an obstruction (see *McLaughlin v. Charlotte & S. C. R. Co.*, 5 Rich. Law, 583).

<sup>3</sup> *Hughes v. Providence & Worcester R. Co.*, 2 R. I. 493; *Regina v. United Kingdom Elec. Telegraph Co.*, 9 Cox C. C. 174; 3 Fost. & F. 73. But where a railroad company has diverted a road *ultra vires*, but with a *bona fide* view to the convenience of the public, a court of equity will not compel a replacing of the road so as to make the work *intra vires*, if the result will be to cause greater inconvenience to the public

a railroad company, having a right to build its road along a highway, is bound to exercise that right so as not unnecessarily to obstruct the highway, and to take reasonable care to protect those passing thereon from injury. It is, therefore, liable for any injuries happening to a passenger on the highway, on account of its neglect to use such care.<sup>1</sup> It may use the highway for the purposes of its business, as in making up its trains and shifting its cars, but this must be done only to a reasonable extent, and in a reasonable manner, without encroaching upon the rights of others who have an equal right to use it.<sup>2</sup> It cannot, without clear necessity, place its depot so that the receiving and discharging of passengers injuriously interferes with the use of the highway.<sup>3</sup>

§ 365. The only effect, therefore, of a license to disturb a street, is to make that lawful which would otherwise have been unlawful, so far as the public authority which gives the license is concerned. As to all others, the party undertakes the work at his peril.<sup>4</sup> Thus, one who, under a

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(Attorney-General v. Ely, Haddenham & S. R. Co., Law Rep. 6 Eq. 106). An unnecessary encroachment by a railroad corporation upon a turnpike, by placing its track thereon, and not restoring the turnpike to its original width and "former state so as not to impair its usefulness," as required by its own charter, is a public nuisance, for which any person who thereby sustains a particular injury may maintain an action (Moshier v. Utica & Schenectady R. Co., 8 Barb. 427).

<sup>1</sup> Veazie v. Penobscot R. Co., 49 Maine, 119.

<sup>2</sup> Gahagan v. Boston &c. R. Co., 1 Allen, 187.

<sup>3</sup> State v. Morris & Essex R. Co., 1 Dutch. 437; State v. Vermont Central R. Co., 27 Verm. 103; and see Lackland v. North Missouri R. Co., 31 Mo. 180.

<sup>4</sup> McCamus v. Citizens' Gaslight Co., 40 Barb. 380, per Scrugham, J. In Selden v. Del. & Hud. Canal Co. (29 N. Y. 634), it was held that a legislative license to enlarge a canal will authorize an increase of the *depth* of the channel as well as the *width*, and such increase of depth may be produced by excavations from the bottom, or by raising the banks, or both, and the license will not only relieve the licensee from liability for making the enlargement, but also from liability for any consequences which might naturally flow from such enlargement. But no license can be held to screen the licensee from the consequences of carelessness or unskillfulness. (And see Stevens v. Stevens, 11 Metc. 251). "The distinction is now clearly established be-

license, excavates a street, is bound to restore it to a safe condition. Neglect to do so is not less culpable because of having received such license.<sup>1</sup> If, in relaying the pavement of a street which he has disturbed, he or his workmen so lay the stones as to give such an appearance of security as would induce a careful person, using reasonable caution, to tread upon them as safe, when, in fact, they are not so, he will be answerable in damages for any injury such person may sustain in consequence.<sup>2</sup>

§ 366. It is lawful within certain limits, not necessary to be defined here, to obstruct the highway for the purpose of erecting or repairing a building on land adjoining. The mere fact of such obstruction, therefore, is not conclusive evidence of negligence. The person under whose control the work is done must use ordinary diligence to complete it, so as to remove the obstructions to the road as soon as is reasonably possible, and is liable to all persons specially injured by his failure to do so.<sup>3</sup> And, while the obstruc-

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tween damage from works authorized by statutes, where the party generally is to have compensation and the authority is a bar to an action, and damage by reason of the works being negligently done, as to which the owners' remedy by way of action remains" (*Brine v. Great Western R. Co.*, 2 Best & S. 402). This distinction is as applicable to works executed for one purpose as for another (*Ib.*)

<sup>1</sup> *McCamus v. Citizens' Gaslight Co.*, 40 Barb. 380. In *Jones v. Bird* (5 Barn. & Ald. 837), it was held that one actually engaged in laying a sewer, authorized by statute, was not protected merely because acting *bona fide* and to the best of his skill and judgment. "That," said Justice Bayley, in that case, "is not enough; they are bound to conduct themselves in a skillful manner, and the question was most properly left to the jury to say whether the defendants had done all that any skillful person could reasonably be required to do in such a case" (see *Whitehouse v. Fellows*, 10 C. B. [N. S.] 765; *Brownlow v. Metropolitan Board*, 13 Id. 768). In the last case, it was decided that an action lay for the injury sustained by a ship-owner for the improper construction of a sewer in the bed of the Thames. This case was affirmed in the Exchequer Chamber (16 Id. 546).

<sup>2</sup> *Drew v. New River Co.*, 6 Carr. & P. 754.

<sup>3</sup> In *Cushing v. Adams* (18 Pick. 110), it was held that an action would lie in favor of the owner of a private way against one whom he had licensed to use the way for building purposes, and who unreasonably delayed the work, and, consequently, the removal of the obstructions. The principle of the decision is equally applicable to an unnecessary obstruction of a public way.

tion continues, he is bound to use ordinary care to warn passers-by of any danger to which they are exposed thereby.<sup>1</sup> This may be done by means of a formal notice, such as could not escape the attention of a traveler, or by means of an effectual barricade, or in any other manner that is reasonably likely to accomplish the purpose. There is no rule of law which limits the builder to the use of any one or more of the modes here suggested.<sup>2</sup> If any precautions are taken, it is a question of fact whether they are sufficient, under the circumstances, to give notice of the danger to a traveler using ordinary care. They must, however, be sufficient for that purpose, so that, if any accident happens to a traveler, he shall be in fault.<sup>3</sup>

§ 367. So, where the temporary use of a street is reasonably necessary for the *bona fide* carrying on of an adjoining owner's business, as by the unloading of carts and deposit of goods, &c., therein, the law will go far to protect him in such use.<sup>4</sup> But the inconvenience to the public must not be prolonged an unreasonable time;<sup>5</sup> and it should be borne in mind that the right to lade and unlade carriages in the highway is entirely subordinate to the

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<sup>1</sup> Vanderpool v. Husson, 28 Barb. 196; Jackson v. Schmidt, 14 La. Ann. 806.

<sup>2</sup> Vanderpool v. Husson, 28 Barb. 196.

<sup>3</sup> Jackson v. Schmidt, 14 La. Ann. 806.

<sup>4</sup> Commonwealth v. Passmore, 1 Serg. & R. 219; Rex v. Carlisle, 6 Carr. & P. 636, per Parke, J. The streets of a town are fairly subject to many purposes to which a road in the country would not be, and may be used for the temporary deposit of goods in their transit to its store-house or for wharfage, regard being had to their evident object and purpose (Haight v. Keokuk, 4 Iowa, 199).

<sup>5</sup> In Rex v. Jones (3 Campb. 226) the defendant, who was a lumber-dealer, occupied a small yard close to the street, and was in the habit, owing to the small size of his yard, of depositing the long pieces of timber in the street, and there sawing them up before carrying them into the yard. Lord Ellenborough said: "A cart or wagon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house; the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance" (Rex v. Ward, 4 Ad. & El. 405; Rex v. Russell, 6 Barn. & Cr. 566; Bradbee v. London, 5 Scott N. R. 79).

right of passage, and must be exercised in such a manner as not unreasonably to abridge or incommode that right.<sup>1</sup> Such an unreasonable interference with a highway is a nuisance, and the utmost care used in the creation or enjoyment of a nuisance is no excuse for it.

§ 368. The obligation to repair may be, and frequently is, imposed by law upon two or more towns or counties—as, for example, the repair of a bridge which spans a stream dividing two towns. In such a case, the towns are severally, as well as jointly, liable for its non-repair.<sup>2</sup> Where several persons are concerned in the creation of an unauthorized obstruction in a highway, they are jointly and severally liable for the consequences. One who employs another to dig a trench in a highway cannot relieve himself from liability therefor by any stipulation with his employee. Both the person who procured the nuisance to be made and the immediate author of it are liable.<sup>3</sup>

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<sup>1</sup> *Rex v. Russell*, 6 East, 427; *Rex v. Cross*, 3 Campb. 226; *Rex v. Jones*, Ib. 230. One cannot legally carry on any part of his business in the public street to the annoyance of the public. The primary object of the street is, to afford a free passage to the public, and any thing which impedes that free passage, without necessity, is a nuisance, and if the nature of the defendant's business and the condition of his premises are such as to require a congregation of wagons in, and an obstruction of, the adjoining street, he must enlarge his premises, or remove to some more convenient spot (*People v. Cunningham*, 1 Den. 524). Thus, a canal-boat permanently stationed in a canal basin was held a nuisance (*Hart v. Albany*, 9 Wend. 571; affirming S. C., 3 Paige, 213). Whether a floating dock in a slip of wharves is a nuisance, see *Hecker v. N. Y. Balance Dock Co.*, 13 How. Pr. 549; and *contra*, 24 Barb. 215. It has been held *not* to be a nuisance to obstruct a highway by holding a fair or market in it, if there has been an uninterrupted custom for twenty years (*Rex v. Smith*, 4 Esp. 109; *Rex v. Canfield*, 6 Id. 136. But see *Commonwealth v. Milliman*, 13 Serg. & R. 403; *Wilkes v. Hungerford Market*, 2 Bing. N. C. 281).

<sup>2</sup> In a case where the expense of keeping a bridge in repair was imposed by statute upon several towns and a railroad company jointly, with a provision that the municipal authorities of one of the towns should have the care and superintendence of it, and should employ all services necessary in the care of it, it was held, that the railroad company had no right of action against the said town for damages sustained by it through a defect in the bridge (*Malden &c. R. Co. v. Charlestown*, 8 Allen, 245).

<sup>3</sup> *Storrs v. Utica*, 17 N. Y. 104; *Creed v. Hartmann*, 29 N. Y. 591; affirming S.

§ 369. Having ascertained the persons upon whom any obligation in respect to highways rests, we proceed to inquire more particularly into the nature and extent of that obligation, and in what manner it may be violated. In the first place, as to the degree of care required of those whose duty it is to maintain highways. Where, as in the New England states and Wisconsin, all towns are required by statute to make and keep their highways "safe and convenient" for travel, and they are expressly declared to be liable in damages for all injuries occasioned by a neglect to do so, the question of care or want of care on the part of a town is altogether immaterial. The exercise of any degree of care in repairing a highway is no defense, in an action against a town in any of those states, for in-

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C., 8 Bosw. 123. In the last case the defendant was one of a firm who contracted with the owner of city lots to build houses upon them, and made a sub contract with one Brady to make all necessary excavations, by digging the ground, blasting the rocks, &c. The latter covenanted to guard against accidents by proper precautions, and to make good all damages. Brady made an excavation under the sidewalk, and covered it with an insufficient platform. The plaintiff fell through it into the excavation and was injured. The judge charged, "if the excavation was caused by the party sued (the contractor), he was responsible for not having the excavation properly protected." The court, on appeal, sustained the charge, and affirmed the judgment in favor of plaintiff. Selden, J., said: "The basis of the defendant's liability is his own wrongful act in procuring the excavation to be made without authority, and not the negligence of the workmen in performing or guarding the work;" and he draws the distinction between this case and the cases of *Blake v. Ferris* (5 N. Y. 48); *Pack v. Mayor &c. of New York* (8 Id. 222), and *Kelly v. Mayor &c. of New York* (11 Id. 432), in each of which cases the work was authorized by the corporate authorities, while in this case there was no evidence of such a license. In *Chicago v. Robbins* (2 Black, 418), an excavation in front of a building was left open and unguarded; and although this was done by a contractor for the work, still it was continued for some time after the owner of the premises had knowledge of its condition, and had been notified by the authorities of its danger. The owner was held liable for an injury occasioned to one falling into the hole (see *Veazie v. Penobscot R. Co.* 49 Maine, 119). Persons who cause an area to be constructed under the highway, are bound at their peril to keep it so covered that the way would be as safe as before the area was built; and when the covering, from any cause, becomes unsafe, they are responsible. It is no defense that the covering was done by contractors who agreed to make it safe, or that the covering became unsafe by the wrongful act of a third party (*Congreve v. Smith*, 18 N. Y. 79; *Congreve v. Morgan*, 18 Id. 84; *Silvers v. Nerdlinger*, 30 Ind. 53).



juries from a defect in the road, if, notwithstanding such care, the road was still defective.<sup>1</sup> It is only necessary, in such an action, to prove the existence of the defect, and that the injury was occasioned thereby.<sup>2</sup> The rule is otherwise in the case of towns, or other municipal bodies, upon whom no such absolute liability is imposed. In their case, negligence in maintaining the highway must be shown; and the mere existence in a highway of an obstruction or other defect is not enough to establish such negligence. They are only bound to exercise ordinary care and vigilance in the keeping of the highway.<sup>3</sup> And, at common law, the proprietors of turnpikes, plank-roads, toll bridges and canals, are bound to exercise only ordinary care in the maintenance of their highways.<sup>4</sup>

§ 369 *a.* The question, what is a “safe and convenient” road or bridge, or what is a “defect or want of repair” therein, within the meaning of those terms as used in the statutes of the states to which we have referred, is one of fact for the jury to determine, under the instructions of the court, upon the circumstances of each particular case,<sup>5</sup> such as the season of the year, the hour of the day or night, the manner in which the accident occurred, and the nature of the accident itself.<sup>6</sup> Under the Maine statute, it has been held that a “defect or want of repair” is either inert matter left encumbering the street,

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<sup>1</sup> *Horton v. Ipswich*, 12 Cush. 488.

<sup>2</sup> *Merrell v. Hampden*, 26 Maine, 234; *Howe v. Castleton*, 25 Verm. 162.

<sup>3</sup> *Ante*, §§ 147-149.

<sup>4</sup> *Ante*, § 351.

<sup>5</sup> *Green v. Danby*, 12 Verm. 338; *Rice v. Montpelier*, 19 Id. 470; *Cassidy v. Stockbridge*, 21 Id. 391; *Sessions v. Newport*, 23 Id. 9; *Kelsey v. Glover*, 15 Id. 708; *Merrell v. Hampden*, 26 Maine, 234; *Tripp v. Lyman*, 37 Id. 250; *Lawrence v. Mt. Vernon*, 35 Id. 100; *Fitz v. Boston*, 4 Cush. 365; *City of Providence v. Clapp*, 17 How. U. S. 161; *Johnson v. Haverhill*, 35 N. H. 74; *Winship v. Enfield*, 42 Id. 197; *People v. Carpenter*, 1 Mich. 273.

<sup>6</sup> *Hutchinson v. Concord*, 41 Verm. 271.

either upon or over it, or structural defects endangering the public travel ;<sup>1</sup> and, therefore, a team temporarily stationed in the street, under the charge of the owner or driver, is not a defect or want of repair to be amended, or obstruction to be removed, within the meaning of the statute.<sup>2</sup> As a general rule, the defects in highways, whether structural or otherwise, for which towns are liable under such a statute, are those, and only those, which are indictable at common law as nuisances.<sup>3</sup> But, on the other hand, it is not every nuisance which obstructs, hinders, or endangers travelers upon a highway that constitutes a defect of the highway, within the meaning of that term as used in the statutes.<sup>4</sup> In a very recent and well-

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<sup>1</sup> *Davis v. Bangor*, 42 Maine, 522.

<sup>2</sup> *Ib.* See *Bigelow v. Weston*, 3 Pick. 291 ; *Snow v. Adams*, 1 Cush. 443 ; *Frost v. Portland*, 11 Maine, 271. Thus, a town is not liable for injuries to a traveler caused by boys coasting on sleds on a highway, this not being an "insufficiency," &c. (*Hutchinson v. Concord*, 41 Verm. 271 ; *Ray v. Manchester*, 46 N. H. 59).

<sup>3</sup> So held in Massachusetts (*Howard v. North Bridgewater*, 16 Pick. 189), and in Maine (*Merrell v. Hampden*, 26 Maine, 234). In *Goldthwait v. East Bridgewater* (5 Gray, 61), the judge refused to rule at the trial that, in order to maintain the action against a town, the defect must be of such a nature that the town would have been liable to indictment therefor. Held, that this was not open to exception.

<sup>4</sup> *Hewison v. New Haven*, 34 Conn. 136, per Carpenter, J. In *Hixon v. Lowell*, (13 Gray, 59), the court says: "The traveler may be subjected to inconvenience and hazard from various sources, none of which would constitute a defect or want of repair in the way for which the town would be responsible. He may be annoyed by the action of the elements ; by a hail-storm, by a drenching rain, by piercing sleet, by a cutting and icy wind, against which, however long continued, a town would be under no obligation to furnish him protection. He might be obstructed by a concourse of people, by a crowd of carriages ; his horse might be frightened by the discharge of guns, the explosion of fireworks, by military music, by the presence of wild animals ; his health might be endangered by pestilential vapors, or by the contagion of disease ; and these sources of discomfort and danger might be found within the limits of the highway, and continue for more than twenty-four hours, and yet that highway not be, in any legal sense, defective or out of repair. It is obvious that there may be nuisances upon traveled ways, for which there is no remedy against the town which is bound by law to construct and maintain the way. If the owner of a distillery, for example, or of a manufactory adjoining the street of a city, should discharge continuously, from a pipe or orifice opening toward the street, a quantity of steam or hot water, to the nuisance and injury of passers-by, they must certainly seek redress in some other mode than by an action for a defective way."

considered case in Connecticut, the court defined a defect in a highway, as that term is used in the statute of that state, as follows: "any object in, upon, or near the traveled path, which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon, or which, from its nature and position, would be likely to produce that result, would generally constitute a defect in the highway."<sup>1</sup> Therefore, any object upon or near the traveled path, which, in its nature, is calculated to frighten horses of ordinary gentleness, being likely to obstruct the right of way, may constitute a defect in the way itself.<sup>2</sup>

§ 370. Reserving for a subsequent page numerous illustrations of the foregoing rule, as applied in particular cases, we shall here speak, in the first place, of the faulty construction of roads and bridges, and, in the second place, of their improper maintenance. The act of opening, altering, and closing highways is an exercise of the right of eminent domain. Hardly any such work is undertaken without causing an indirect injury to the property of individuals. For private property actually taken for the public use of a highway, just compensation is insured by the constitution; but for the damages consequential to, and necessarily resulting from, the construction of a highway, neither the constitution nor the common law provide a remedy. Such damages have

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If the walls of a house adjoining a street in a city were erected in so insecure a manner as to be liable to fall upon persons passing by, or if the eaves-trough or water-conductor was so arranged as to throw a stream from the roof upon the sidewalk, there being in either case no structure erected within or above the traveled way, it would not constitute a defect in the way."

<sup>1</sup> Hewison v. New Haven, 34 Conn. 135, per Carpenter, J.

<sup>2</sup> *Ib.* See *post*, § 388; Morse v. Richmond, 41 Verm. 435; Chamberlain v. Enfield, 43 N. H. 358; Winship v. Enfield, 42 Id. 199, 200, 216; Dimock v. Sheffield, 30 Conn. 129; Lung v. Tyngsborough, 11 Cush. 563. But compare Horton v. Taunton, 97 Mass. 266; Kingsbury v. Dedham, 13 Allen, 186; Cook v. Charlestown, Id. 190, u.; Keith v. Easton, 2 Allen, 552, and cases *infra*.

always been regarded as *damnum absque injuria*.<sup>1</sup> Thus, where, in grading a street, a high bank, which constituted the natural support of the plaintiff's house, adjacent to the street, was removed, causing a portion of the house to fall, it was held that, in the absence of any want of care or skill in the manner of doing the work, no damages were recoverable.<sup>2</sup> So a party who, in consequence of a

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<sup>1</sup> The decisions are uniform on this point, and the following, among other cases, may be consulted for applications of the principle: *Radcliff v. Brooklyn*, 4 N. Y. 195; *Graves v. Otis*, 2 Hill, 466; *Kavanagh v. Brooklyn*, 38 Barb. 232; *Benedict v. Goit*, 3 Barb. 459; *Green v. Reading*, 9 Watts, 382; *Goszler v. Georgetown*, 6 Wheat. 593; *Matter of Furman Street*, 17 Wend. 667; *O'Connor v. Pittsburgh*, 18 Penn. St. 187; *Taylor v. City of St. Louis*, 14 Mo. 20; *Round v. Mumford*, 2 R. I. 154; *Humes v. Mayor &c.*, 1 Humph. 403; *Lebanon v. Olcott*, 1 N. H. 339; *Bordentown &c. T. Co. v. Camden & Amboy R. Co.*, 2 Harrison, 314; *Lehigh Bridge Co. v. Lehigh Coal & Nav. Co.*, 4 Rawle, 9; *Steele v. Western Inland Lock Nav. Co.*, 2 Johns. 283; *Lansing v. Smith*, 8 Cow. 146; *Jermaine v. Waggoner*, 1 Hill, 279; 7 Id. 357; *Wilson v. Mayor &c. of New York*, 1 Den. 595; *Mayor &c. of N. Y. v. Bailey*, 2 Den. 450; *Bennett v. New Orleans*, 14 La. Ann. 120; *Clark v. Wilmington*, 5 Harringt. 243; *State v. Graves*, 19 Md. 351; *Cole v. Muscatine*, 14 Iowa, 296; *Towle v. Eastern R. Co.*, 17 N. H. 519; *Allen v. Silvers*, 22 Ind. 491; *Madison v. Ross*, 3 Ind. 236; *Vincennes v. Richards*, 23 Ind. 381; *Monongahela Bridge Co. v. Kirk*, 46 Penn. St. 112; *Clark v. Binghampton & Pittsburg Bridge Co.*, 41 Id. 147; *Alexander v. Milwaukee*, 16 Wisc. 247, in which the cases of *Goodall v. Milwaukee* (5 Id. 32), and *Weeks v. Milwaukee* (10 Id. 242), are distinguished; *Callender v. Marsh*, 1 Pick. 418; *Boston & Roxbury Mill Dam Co. v. Newman*, 12 Id. 467; *Boston Water-Power Co. v. Boston & Worcester R. Co.*, 16 Pick. 512; S. C., 23 Id. 360; *Flagg v. Worcester*, 13 Gray, 601; *Hatch v. Vermont Central R. Co.*, 25 Verm. 49. But see *Delaware & Raritan R. Co. v. Lee*, 2 Zabriskie, 243; *Quinn v. City of Paterson*, 3 Dutch. 35, and *Tinsman v. Belvidere & Delaware R. Co.*, 2 Id. 148. In *Goodlove v. Cincinnati* (4 Ohio, 500), which has been considered as an authority against the proposition in the text, the question arose on a demurrer to the declaration. The defendants (a municipal corporation) were charged with "maliciously and without cause" digging up and destroying the street, to the plaintiff's injury; and the court says: "When a corporation acts illegally and maliciously, we conceive that it ought to be made directly responsible." But that case is not an authority against those who act legally and without malice. See, also, *McCoombs v. Akron*, 15 Ohio, 474; *Rhodes v. Cleveland*, 10 Ohio, 159; *Smith v. Cincinnati*, Id. 514; *Saville v. Giddings*, 7 Id. 212; *Hickox v. Cleveland*, 8 Id. 543.

<sup>2</sup> *Radcliff v. Brooklyn*, 4 N. Y. 195. In *Roberts v. Chicago* (26 Ill. 249), Caton, C. J., says: "We recognize unhesitatingly, as sound law, that the city has the right to establish and change the grades of the streets, and to compel the owners of lots to grade the streets accordingly. And when a grade is established or altered in good faith, with the purpose of improving the streets, the courts will not inquire whether it was the very best grade which could have been adopted," &c.

highway being laid upon the line of his land, becomes obliged to maintain the whole fence, cannot recover his damages.<sup>1</sup> And so no action lies for damages sustained in consequence of a railroad track being lawfully and properly laid in a public street, though causing temporary inconvenience to the adjoining proprietor, while the work is in progress.<sup>2</sup>

§ 371. Although the citizen cannot recover for damages incidental to the opening of a highway, he has the right to insist that ordinary care should be used in the execution of the work, and he has a remedy for any injuries he may suffer from a neglect to use such care.<sup>3</sup> However lawful the work itself, or under whatever authority it may be performed, the party undertaking it will not be protected from the consequences of his own unskillfulness or malice.<sup>4</sup> But no more than ordinary care can be required.<sup>5</sup>

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<sup>1</sup> Kennett's Petition, 4 Foster, 139. See *Wolfe v. Covington & Lexington R. Co.*, 15 B. Monr. 404.

<sup>2</sup> *Chapman v. Albany & Sch. R. Co.*, 10 Barb. 360; *Adams v. Saratoga & Wash. R. Co.*, 11 Id. 414. See also *Rogers v. Kennebec & Port. R. Co.*, 35 Maine, 319; *Whittier v. The Same*, 38 Id. 26; *Burton v. Philadelphia &c. Co.*, 4 Harrison, 252; *In re Philadelphia & T. R. Co.*, 6 Wharton, 25; *Henry v. Pittsburg & Alleghany Bridge*, 8 Watts & S. 85; *Hollester v. Union Co.*, 9 Conn. 436; *Imlay v. Union B. & R. Co.*, 26 Id. 249; *Commonwealth v. Temple*, 14 Gray, 69; *Springfield v. Conn. River R. Co.*, 4 Cush. 63; *Mahon v. N. Y. Central R. Co.*, 24 N. Y. 660; *People v. Law*, 34 Barb. 494; *Brooklyn City R. Co. v. Coney Island R. Co.*, 35 Id. 364; *People v. Kerr*, 37 Id. 358; S. C., on appeal, 27 N. Y. 188; *Wager v. Troy Union R. Co.*, 25 N. Y. 526; *Carpenter v. Oswego & Syracuse R. Co.*, 16 Id. 97; *Goodall v. Milwaukee*, 5 Wisc. 32. See cases holding a somewhat contrary doctrine collected in Angell on Highways, 2d ed. § 91 *a*.

<sup>3</sup> *Barton v. Syracuse*, 37 Barb. 292; *Dayton v. Pease*, 4 Ohio St. 80; *Delmonico v. Mayor &c. of N. Y.*, 1 Sandf. 222; *Smith v. Milwaukee*, 18 Wisc. 63; *Weightman v. Washington*, 1 Black, 39.

<sup>4</sup> "The act done, being itself lawful, can only become unlawful in consequence of the mode in which it is carried into execution" (per Holroyd, J., *Boulton v. Crowther*, 2 Barn. & Cr. 703. See *Governor &c. of British Cast Plate Manuf. v. Meredith*, 4 T. R. 794; *Leader v. Moxton*, 3 Wils. 461; S. C., 2 Wm. Placks. 924).

<sup>5</sup> *Townsend v. Susquehannah Turnp. Co.*, 6 Johns. 90; *Wilson v. Susquehannah Turnp. Co.*, 21 Barb. 68; *Richardson v. Royalton Turnp. Co.*, 5 Verm. 580; *Milwaukee v. Davis*, 6 Wisc. 377, and cases *infra*.

§ 372. Where the plan of construction, or the materials to be used therein, are definitely prescribed by statute, non-compliance with the statutory requirement is a nuisance, and a party injured thereby may recover his damages without proving negligence.<sup>1</sup> Where the statute does not specify the plan or other particulars of construction, that course should be adopted which is best calculated to subserve the object of the work, and the degree of care to be used must be in proportion to the extent of the injury which will be likely to result in case the plan should turn out to be defective.<sup>2</sup>

§ 373. Before adopting a plan of construction, the party undertaking it should consult an architect, surveyor, or other person skilled in such matters; and, in the selection of an adviser, he is bound to exercise that care and

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<sup>1</sup> *Wilson v. Susquehannah Turnp. Co.*, 21 Barb. 68; *Pekin v. Newell*, 26 Ill. 320; see *Carron v. Martin*, 2 Dutch. 594; *Regina v. Eastern Counties R. Co.*, 2 Q. B. 569. Where a railroad company is required by statute to maintain fences along the line of its road, and is declared to be liable for all damages from a neglect to do so, it is absolutely liable, in case such fences are not maintained, without reference to the question of negligence on either side (*Shepard v. Buffalo, N. Y. & Erie R. Co.*, 35 N. Y. 641; *Balcom, J., Hance v. Cayuga & Sus. R. Co.*, 26 Id. 428; *Munch v. N. Y. Central R. Co.*, 29 Barb. 647; *Corwin v. N. Y. & Erie R. Co.*, 13 N. Y. 42; see *Hughes v. Providence & Worcester R. Co.*, 2 R. I. 493; *Knight v. Opelousas &c. R. Co.*, 15 La. Ann. 105; *Regina v. United Kingdom Elec. Tel. Co.*, 3 Fost. & F. 73). For a construction of the English statute on the same subject, see the very recent case of *Buxton v. Northeastern R. Co.* (Law Rep. 3 Q. B. 549). Where the proprietors of a canal were bound by their charter to construct it so deep and wide that rafts of a certain description could pass through it, they were held liable to the owner of a raft for all damages suffered by him in consequence of the canal not being sufficient to pass the raft (*Riddle v. Proprietors of Locks &c.*, 7 Mass. 169). Where the statute provided that the road "shall be bedded with stone, gravel, or such *other material* as may be found on the line thereof," this cannot be construed to authorize the use of the ordinary soil where this is not gravel or some other hard material (per *Leonard, J.*, *People v. Waterford & Stillwater Turnp. Co.*, 39 N. Y. 327). It is a question of fact, to be determined by the jury, whether the defendants had kept their road in repair according to the spirit and intent of the statute (*Ib.*) But the statute must be construed reasonably, in furtherance of the purpose of the franchise granted (*Monongahela Bridge Co. v. Kirk*, 46 Penn. St. 112).

<sup>2</sup> *Mayor &c. of New York v. Bailey*, 2 Den. 433.

prudence which a discreet and cautious person would or ought to use if the whole loss or risk were to be his own.<sup>1</sup> Municipal corporations and public officers (who are considered to act judicially in determining the time, place, and manner of erecting public works<sup>2</sup>) will, as a general rule, be protected by the advice of persons professionally familiar with the subject, notwithstanding the structure turns out to be radically defective.<sup>3</sup> But if an incompetent person is intrusted with the work, his advice is no justification; and although a competent person is selected, and a plan is adopted on his advice, yet if it becomes apparent, during the progress of the work, that the plan adopted is defective, the corporation is guilty of negligence if it allows the work to progress to completion on that plan.<sup>4</sup> But it is clear that an individual who undertakes to build a road or bridge for his own profit, cannot relieve himself from responsibility for defects

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<sup>1</sup> *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463.

<sup>2</sup> *Wilson v. Mayor &c. of N. Y.*, 1 Denio, 795; *Milwaukee v. Davis*, 6 Wisc. 377; see *Waggoner v. Jermaine*, 7 Hill, 357; reversing S. C., 1 Id. 279; see *ante*, §§ 127-131.

<sup>3</sup> Thus, where road trustees ordered a drain to be cut, and informed themselves how it could best be done, and took the opinion of a competent surveyor upon the subject, who said that it was not likely to produce injury to any one, it was held, in an early English case, that no negligence could be imputed to them, as they did all that the statute required them to do in the best manner they were able, and according to the best information, though it turned out that they were mistaken in their judgment (*Sutton v. Clarke*, 1 Marsh. 429; S. C., 6 Taunt. 29; see also *Sherman v. Kortright*, 52 Barb. 267).

<sup>4</sup> *Weightman v. Washington*, 1 Black, 39. In that case, a city council, contemplating the erection of a bridge, advertised for proposals for its construction, and a committee was appointed, who took the opinions of scientific men upon the plans to be adopted; but the opinions of the scientific persons so consulted were not entirely unanimous, and the contractor remonstrated against building the arches at a height never before attempted for that kind of bridge. The plan was essentially and radically defective, and at the time of the falling of the bridge its braces were broken and some of the wedges had fallen out, and the bridge was loose and shook greatly when carriages passed over it. The corporation was held liable to a traveler for injuries sustained by reason of the falling of the bridge.

therein, on the ground that he employed a competent engineer to build it.<sup>1</sup>

§ 374. While a municipal corporation may be said to act judicially in selecting and adopting the plan on which a public work shall be constructed, yet, so soon as it begins to carry out that plan, it acts ministerially, and it is bound to see that the work is done in a reasonably safe and skillful manner.<sup>2</sup> It is negligence to construct a road or bridge of a poor kind of material, not likely to endure the weather,<sup>3</sup> or to make it of a width unsafe or

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<sup>1</sup> *Grote v. Chester & Holyhead R. Co.*, 2 Exch. 251; *Allen v. Hayward*, 7 Q. B. 960.

<sup>2</sup> *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463. In that case, a city corporation directed the construction of a culvert for the purpose of carrying off the water of a natural stream, which had been the outlet to the surface water of a portion of the city. In respect to the requisite capacity of the culvert, the city was advised and directed by a surveyor (not a professional engineer). A freshet having occurred, the culvert, in consequence of its want of capacity, and the unskillfulness of its construction, failed to discharge the waters, so that they were set back upon the plaintiff's factory, causing injury to it. The court held, that although the ordinance directing the improvement was judicial in its nature, yet the actual prosecution of the work was purely of a ministerial character, and the corporation was bound to see that it was done in a safe and skillful manner (*Lacour v. Mayor &c. of New York*, 3 Duer, 406; *Parker v. Lowell*, 11 Gray, 353; *Lloyd v. Mayor &c. of New York*, 5 N. Y. 369; *Wilson v. Mayor &c. of N. Y.*, 1 Denio, 555; *Martin v. Brooklyn*, 1 Hill, 545; *Child v. Boston*, 4 Allen, 41; *Mellen v. Western R. Co.*, 4 Gray, 301; *Wheeler v. Worcester*, 10 Allen, 604; *Eastman v. Meredith*, 36 N. H. 284; and see other cases collected under § 144, *ante*). A municipal corporation, which has authority to grade the streets, is liable, in an action on the case, for any damage which may accrue to an individual from the work being done in an unskillful and incautious manner (*Meares v. Wilmington*, 9 Ired. [N. C.] Law, 73). In the building of a sewer by a municipal corporation, earth was carelessly filled up over a vault of the proprietor of the adjacent land, causing it to cave in and destroying wines, &c., in it. The corporation was held liable for the damage (*Delmonico v. Mayor &c. of New York*, 1 Sandf. 222). A municipal corporation procured a cistern to be dug under a portion of a sidewalk. It was negligently left open, and the plaintiff fell into it and was disabled. Held, that the corporation had the right to cause the cistern to be dug, but was responsible for damages occasioned by the negligence of the agents or servants employed by it for that purpose (*Memphis v. Lasser*, 9 Humph. 757).

<sup>3</sup> *Townsend v. Susquehannah Turnp. Co.*, 6 Johns. 90; *People v. Waterford & S. Turnp. Co.*, 2 Keyes [N. Y.] 327. In *Regina v. High Halden* (1 Fost. & F. 678), the parish was indicted for the negligent repair of a high road. It appeared that the road was, particularly in wet weather, in quite an impassable state. The road was



inconvenient for travel.<sup>1</sup> But the appropriate width of a highway must, of course, depend much upon its location, and the business to which it will be principally appropriated.<sup>2</sup>

§ 375. It is negligence, in undertaking to grade a street, to omit to make provision for carrying off the waste water necessarily connected, whereby adjacent premises are overflowed,<sup>3</sup> or to cause needless obstruction of streams in the construction of bridges, or by imperfect or insufficient sluices or culverts for the passage of streams, whereby adjoining land is injured.<sup>4</sup> It

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on old *soft* road formed of Kent clay, and had never been repaired by the parish with hard substances. The defense was, that the parish was not obliged to make the road a *hard* road. The court charged the jury, that the parish was not bound to make the road hard, or bring stone or other hard substances to repair road; but they were bound, in some way, by stone or other hard substances if necessary, to keep the road in such repair as to be passable. The jury returned a verdict of guilty.

<sup>1</sup> *Wilson v. Susquehannah Turnp. Co.*, 21 Barb. 68, 81; see *Waterford &c. Turnp. Co. v. People*, 9 Barb. 161, 175. Insufficient width is "a defect" under the statute of Massachusetts making towns liable for defects in their highways (*Aldrich v. Pelham*, 1 Gray, 510; see *post*, § 384).

<sup>2</sup> *Fowler v. Mott*, 19 Barb. 204, 218. "A greater width is desirable when it passes through a populous village or by a church or court-house, than when it runs through woodland. So, too, when it terminates at a public landing" (Ib.; and see *Ireland v. Oswego &c. Turnp. Co.*, 13 N. Y. 526).

<sup>3</sup> *Kensington v. Wood*, 10 Penn. St. 93; *Case v. N. Y. Central R. Co.*, 24 Barb. 273; *Bellinger v. N. Y. Central R. Co.*, 23 N. Y. 42; but see *Flagg v. Worcester*, 13 Gray, 601.

<sup>4</sup> *Hatch v. Vermont Central R. Co.*, 25 Verm. 49; *Mellen v. Western R. Co.*, 4 Gray, 301; *March v. Portsmouth & C. R. Co.*, 19 N. H. 372; *Smith v. Milwaukee*, 18 Wisc. 63. All obstructions of the stream, such as piles, &c., used in the construction of a bridge, should be removed on the completion of the work. When piles, instead of being entirely removed, were cut off just below the surface of the water, so that a vessel ran on them and was injured, the builder was held liable (*Phila. &c. R. Co. v. Phila. Tow-boat Co.*, 23 How. [U. S.] 209; see *Monongahela Bridge Co. v. Kirk*, 46 Penn. St. 112; *Lawrence v. Great Northern R. Co.*, 16 Q. B. 643; *Steel v. Southwestern R. Co.*, 16 C. B. 550; 32 Eng. L. & Eq. 366). In *Boughton v. Carter* (18 Johns. 405), an action was sustained against a turnpike company, for injury to the land of a private person, in consequence of the company, in repairing their road so as to prevent the effects of freshets, turning the water on to such land. The right of the company to repair their road is restricted by the necessity of its being done so as not to injure the adjoining owner.

is negligence, in contracting for the grading of two streets, which run at right angles with each other, to provide for the completion of one before the other, if the result is necessarily to cause the excavation in one of the streets to be filled with water during the prosecution of the work, without any possibility of escape, and thereby to produce inevitable injury to the property of an adjacent owner.<sup>1</sup>

§ 376. During the progress of the work of altering or repairing a highway, ordinary care must be used to prevent injuries to passengers therefrom ;<sup>2</sup> and if, in altering the grade of, or otherwise working upon, a street previously passable, the way becomes impassable or dangerous for travel, it is negligence to omit to warn the public of danger by erecting fences, barriers, lights, or the like.<sup>3</sup>

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<sup>1</sup> *Lacour v. Mayor &c. of New York*, 3 Duer, 406. In that case, the city corporation made separate contracts for the grading of Thirtieth street and of Second avenue (which run at right angles to each other), the contract for Thirtieth street providing for its completion in May, and that for Second avenue in the February following. The completion of Thirtieth street before Second avenue, caused a deep excavation to be left at their intersection, in which a large amount of water was collected against the plaintiff's adjoining wall, causing injury to it. It was proved that, had Second avenue been cut down in the same proportion with Thirtieth street, or had it been graded at the same time, the difficulty would not have arisen. It was also shown that a drain or culvert could have been made from the end of Thirtieth street to the sewer in Second avenue, which would have drawn off the water. The court charged that the grading of the two streets was to be considered as one work, and that it was, as a matter of law, negligence in the defendants to contract for the grading of Thirtieth street to be completed before the completion of the Second avenue, if the result was necessarily to cause the excavation in the street to be filled with water without possibility of escape. The charge was sustained on appeal. The court said: "It was negligence in law to have contracted as the defendants did contract; and it was negligence in fact in the execution of the work to have omitted the drain in question."

<sup>2</sup> See *James v. San Francisco*, 6 Cal. 528; *Storrs v. Utica*, 17 N. Y. 104; *Conrad v. Ithaca*, 16 Id. 161.

<sup>3</sup> *Storrs v. Utica*, 17 N. Y. 104; *Buffalo v. Holloway*, 7 N. Y. 493; *Grant v. Brooklyn*, 41 Barb. 381; *Silvers v. Nerdlinger*, 30 Ind. 53; *Milwaukee v. Davis*, 6 Wisc. 377. The right of the city to grade or repair a street does not supersede the right of the public to travel over it, if it has been passable before the city has undertaken to grade it (Ib.) It is the duty of a town, in the construction and repair of roads, to provide for the reasonable safety of travelers in reference to such accidents

§ 377. The highway having been completed and opened for public travel, the obligation to keep it in repair immediately attaches. It is well settled, however, that no one can be made liable for the non-repair of a highway until it has been established by regular legal proceedings,<sup>1</sup> or by user and acquiescence for a sufficient period, and has been actually opened for public use.<sup>2</sup> A town is not bound to keep in repair a road or bridge recently laid out or built without any authority.<sup>3</sup> But mere irregularities on the part of the town officers in the proceedings to lay out a highway will not relieve the town from liability for defects in such highway.<sup>4</sup> As to what is a sufficient period

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as may be expected to happen on such roads (*Kelsey v. Glover*, 15 Verm. 708). Road trustees, in repairing a road, cut down half of it about four feet lower than the other half, without using proper precautions to guard it, and a traveler, while passing along in the dark, was there overturned. Held, that in repairing the road, the trustees were bound to do so with the utmost caution, and were liable to the plaintiff (*Millar v. Road Trustees*, Hay, 441; 4 Mur. 563).

<sup>1</sup> *Page v. Westerfield*, 13 Verm. 424; *Vermont v. Leicester*, 33 Id. 653; *Jones v. Andover*, 9 Pick. 146; *Todd v. Rome*, 2 Greenl. [Maine], 55; *Haywood v. Charlestown*, 43 N. H. 61; *Commonwealth v. Low*, 3 Pick. 408; *Commonwealth v. Newbury*, 2 Id. 51; *Milwaukee v. Davis*, 6 Wisc. 377; *St. Paul v. Seitz*, 3 Minn. 297. The wilful obstruction of a road or way constitutes an indictable offense only when the road or way is public, and the obstruction tends to the inconvenience of the common right to use it. An indictment for such an offense, therefore, must show that the obstructed road connected with, and was accessible from, a public highway (*State v. Price*, 21 Md. 449).

<sup>2</sup> "We would not be understood to go the length of deciding that whenever a street is opened by the corporation on paper, or by proceedings under the statute, it is their duty forthwith to regulate and pave it. There are several steps in the matter, all which, we apprehend, are in the legislative discretion of the corporation. But after they have actually opened it for public use, and by their acts invite the public to travel over it, the duty becomes absolute to keep it in repair" (*Per Mason, J., Hutson v. Mayor &c. of N. Y.*, 5 Sandf. 289, 302; and see *Southerland v. Jackson*, 30 Maine, 362, per Wells, J.)

<sup>3</sup> *Commonwealth v. Charlestown*, 1 Pick. 180. A town is not liable for injuries happening upon a ford-way lying out of the highway limits, and used by reason of neglect to repair a bridge, although with the consent of the landowner, if not opened according to statute, or dedicated to, and accepted by, the town (*Hyde v. Jamaica*, 27 Verm. 443; *Sampson v. Goochland*, 5 Gratt. 241). In Indiana a town is not liable for damages caused by a bridge being out of repair, when a road on which the bridge is built does not belong to the town, and there is no evidence that the town had ever adopted the road as a street (*Indianapolis v. Jackson*, 2 Ind. 147).

<sup>4</sup> *Haywood v. Charlestown*, 43 N. H. 61; *State v. Raymond*, 7 Foster, 388. In

of user, the rule is not uniform in the different states. Immemorial usage has always been held to be proof of the existence of a highway.<sup>1</sup> In New York, twelve years user is *prima facie* evidence that the highway was opened by authority.<sup>2</sup> In Maine, it has been held that ten years' user of a highway is not sufficient to oblige a town to keep it in repair,<sup>3</sup> though twenty years' user is;<sup>4</sup> and, as a general rule, the use of a road for twenty years or more is evidence, in all the states, of its being a public highway.<sup>5</sup>

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Vermont, the neglect of the authority establishing a road to prescribe its width excuses the town for liability for not opening and working the same (*Vermont v. Leicester*, 33 Verm. 653).

<sup>1</sup> *Commonwealth v. Low*, 3 Pick. 408; *Jones v. Andover*, 9 Id. 146; *Commonwealth v. Newbury*, 2 Id. 51; *Ward v. Folly*, 2 South. 482.

<sup>2</sup> *Colden v. Thurbur*, 2 Johns. 424. To support an action for the penalty for obstructing a highway, it is sufficient to produce a copy of the establishment of the road as a public highway, without proving all the proceedings preliminary to laying out the road (*Sage v. Barnes*, 9 Johns. 365).

<sup>3</sup> *Estes v. Troy*, 5 Greenl. [Maine], 368.

<sup>4</sup> *Todd v. Romé*, 2 Greenl. [Maine], 55; *Southerland v. Jackson*, 30 Maine, 362.

<sup>5</sup> *Hill v. Richmond*, 2 Woodb. & M. 337; *Smith v. Northumberland*, 36 N. H. 38; *Hall v. Manchester*, 39 Id. 295; *Chadwick v. McCausland*, 47 Maine, 342; *Williams v. Cummington*, 18 Pick. 312. In that case, Martin, J., said: "It is very clear that the use of the bridge by the public, and the erection and support of it by the town for thirty-eight years, is sufficient proof of its existence as a highway." \* \* \* "It may well be doubted whether a town, which, in making or repairing a highway, has by accident or design deviated from the true location, should be allowed to deny their liability to maintain it as they have made it. It would be a dangerous imposition upon the public, and their conduct should be deemed an estoppel *en pais*." Twenty years' user is conclusive in Wisconsin (*Lemon v. Hayden*, 13 Wisc. 159; *Wyman v. State*, Id. 663); but it must be *adverse* (*State v. Joyce*, 19 Wisc. 90). In *Durgin v. Lowell* (3 Allen, 398) it was held that one who lives upon and is acquainted with the condition of a way which has never been formally dedicated to the public, or accepted or treated by the city in which it lies as a public way, but which was constructed by a private corporation upon its own land, for its own use and convenience, and the use and convenience of tenants occupying the houses upon both sides thereof, and who has seen a sign "private way" at one end thereof, cannot sustain an action against the city for an injury sustained by reason of a defect therein, although the way opens into a public street, and has been open to public travel for more than twenty years without interruption, and the city has not closed up the entry to the same, or in any way given notice that it was dangerous. Whether a public highway, which has become such by user, extended outside of the traveled path, is a question for the jury (*Lawrence v. Mount Vernon*, 35 Maine, 100). In an earlier case in Vermont, it was held that a highway might be proved by parol evidence of the acts of the town officers thereon (*Emery v. Washington*, Brayt. 129).

§ 378. In general, therefore, it is not necessary, in order to establish an obligation on the part of the city or town to repair a highway, to prove its formal adoption or acceptance as a highway.<sup>1</sup> Evidence that a road or bridge had been paid for by a town,<sup>2</sup> or that the town has from time to time made repairs upon it,<sup>3</sup> is admissible upon the question of the town's liability to maintain the highway. In Maine and Massachusetts, the statute provides, that if it appears upon the trial that a town has made repairs upon a highway at any time within six years, it cannot be heard to deny the location thereof in an action against it for injuries caused by its non-repair. In the absence, however, of such a statute, the fact that a town has repaired a highway is not conclusive on the question of its obligation to do so. Where the repairs were begun and continued under a mistaken notion of its duty to do so,<sup>4</sup> or where, at the time the repairs were made, the duty of making them was legally binding upon another town or upon a private person, the town is not estopped from denying its duty to re-

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<sup>1</sup> *Clements v. West Troy*, 10 How. Pr. 199, 211; mentioned with approval in *Holdane v. Cold Spring*, 23 Barb. 103, 119; *Bissell v. N. Y. Central R. Co.*, 26 Id. 630.

<sup>2</sup> *Bliss v. Deerfield*, 13 Pick. 102.

<sup>3</sup> *Folson v. Underhill*, 36 Verm. 580; *Hayden v. Attleborough*, 7 Gray, 338; *Kellogg v. Northampton*, 8 Id. 504; *Codner v. Bradford*, 3 Chand. 291; *Milwaukee v. Davis*, 6 Wisc. 377; *Commonwealth v. Petersham*, 4 Pick. 119. In *Rex v. Leake*, 5 Barn. & Ad. 469, 482; S. C., 2 Nev. & M. 583, Parke, J., said: "The parish is at common law bound to repair all public highways; this being, by the common law, the mode by which each parish contributes its share toward the public burthen of repairing all highways, instead of all public roads being repaired by one general tax. Hence, if a road *be dedicated* to the public, no parish can refuse to repair it. It must bear in that shape its share of the general burthen, and its inhabitants receive an equivalent, not in the use of that road in particular, but in the use of all the public roads of the realm. The absence of repair by a parish is indeed a strong circumstance in point of evidence, to prove that the road is not a public one: the fact of repair has a contrary effect, but the conduct of the parish in acquiescing or refusing its acquiescence is, in my opinion, immaterial in every point of view." And *Littledale, J.*, said: "If the parish have repaired it, it furnishes a strong inference that it is a public highway."

<sup>4</sup> *Rex v. Edmunton*, 1 Mood. & R. 24.

pair.<sup>1</sup> But an indictment, and conviction thereon, against a town for the non-repair of a highway is very strong, if not conclusive, evidence that such a highway has been adopted by the town.<sup>2</sup> And, if the town has taken charge

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<sup>1</sup> In *Reed v. Cornwall* (27 Conn. 48), it appeared that a turnpike company organized in the year 1806, under a charter which made no location of its road, took, without any record of the laying out of the road, a previously existing highway into its exclusive control, and from that time till the year 1846, treated it as a part of its road, keeping it in repair, establishing a toll-gate upon it, and taking toll from travelers, all which was done without objection from the town. In 1846 the turnpike company abandoned the road, removed the toll-gate, and ceased to keep the road in repair; from which time to 1854, the town made what repairs were necessary upon it, and the road continued to be used as a public highway, and was necessary to the public convenience. In 1864, a traveler was injured by means of a defect in the road, and brought an action against the town for damages, in which he recovered a verdict. *Held*, in granting the defendants a new trial, (1) that the charter of the turnpike company was not void because it did not locate the road; (2) that regarding the occupation of the highway by the turnpike company as a location of its road over the highway, and as an assumption of the highway as a part of its road (which was rather a question of fact than of law, but as to which no question was made in the case), it followed that the turnpike company became burdened with the duty of keeping the road in repair, and the town was exonerated from that duty; (3) that the duty thus imposed on the turnpike company did not cease when the road was abandoned by it, but continued until the company was dissolved, or at least until the abandonment had continued so long as to furnish a presumption of the legal dissolution of the company; (4) that the town was not estopped by reason of its having repaired the road, from denying its liability for an injury occasioned by a defect therein; that, under the statute concerning highways and bridges, a liability to keep the road in repair could not exist in the town and in the turnpike company at the same time. But see *Proctor v. Andover*, 42 N. H. 362; *State v. Alburgh*, 23 Verm. 262. A town, in pursuance of an act of the legislature, voted in 1852 to accept that part of a turnpike which lay within the limits of the town, and after that time treated that part of the turnpike as one of the town highways, put it in the highway tax bills for repairs, and made all the repairs thereon. In 1851 the toll-gates on the turnpike were thrown open by the turnpike company, and after that time the company made no repairs upon the road. In 1853 the whole franchise or stock of the company was sold on execution. *Held*, in an action against the town for an injury to the plaintiff, caused in 1856, by the insufficiency of the portion of the old turnpike in that town, that the above circumstances alone were sufficient, as against the town, to show a surrender of the road by the company, and that the town was liable for the injury (*Barton v. Montpelier*, 30 Verm. 650). If an incorporated company within the limits of a town lay out a road and dedicate it to the public use, the town will not thereby become liable to repair it, unless it has in some way accepted or adopted it as a way (*Bryant v. Biddeford*, 39 Maine, 193).

<sup>2</sup> *Blodgett v. Royalton*, 14 Verm. 288. In that case, an old road was discontinued, and a new road was laid and worked and open for travel. *Held*, that this was evidence that the new road was opened by the town, and intended for public use. In the

of a public way, and regulated it in the same manner as other highways, it cannot, when sued for defects in the way, defend by alleging an original want of authority to establish the way as a highway, or the want of statutory formalities in laying it out.<sup>1</sup>

§ 379. Where a certain period is allowed a town in which to open a new road, the liability of the town for defects in such road, although opened and partially made, does not begin until the expiration of such period,<sup>2</sup> unless a reasonable notice of such defects is brought home to it.<sup>3</sup> Where the making of the entire road is a condition precedent to any part of it becoming a highway, repairable by the public, no liability attaches until the whole road is completed; and where only a part of it is completed, the district in which such completed part lies is not liable for its non-repair.<sup>4</sup> As to when the obligation to repair a highway will terminate, see sections 404, 405, 406, *post*.

§ 380. It is no defense to an action to recover for injuries sustained by the non-repair or obstruction of a street, that the street has been in that condition for a long time; for it is a maxim that no lapse of time will legalize a public nuisance.<sup>5</sup> Nor is it any defense that a considerable

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same case, it was held that the consent of the selectmen that a person might travel on any road, or their knowledge that the traveler supposed it to be a public highway, would not render the town liable for injuries happening thereon, unless they had done some act recognizing it as a public highway.

<sup>1</sup> Mayor &c. of New York v. Sheffield, 4 Wallace, 189.

<sup>2</sup> Lowell v. Moscow, 12 Maine, 300.

<sup>3</sup> Blaisdell v. Portland, 39 Maine, 113.

<sup>4</sup> Rex v. Cumberworth, 3 Barn. & Ad. 108. In Pennsylvania, if one obstructs a road approved of by the court, though only partially opened, he is liable to the penalty under the statute (*Calder v. Chapman*, 8 Penn. St. 522).

<sup>5</sup> *Dygart v. Schenck*, 23 Wend. 446; *Weld v. Hornby*, 7 East, 195, 199; *Folkes v. Chad*, 3 Doug. 340, 343. The rule that no lapse of time will legalize a public nuisance, does not apply to the case of a simple encroachment upon a highway, not amounting to an obstruction, or a real and substantial annoyance to the public (*Peckham v. Henderson*, 27 Barb. 207).

portion of the roads within the limits of the town have similar imperfections from the same cause, as the freezing and thawing of the ground.<sup>1</sup>

§ 381. It is no excuse for neglecting to maintain a part of a road, that such part would be of no immediate practical use, in consequence of the destruction of a bridge with which the road connects, and which is repairable by another person or town.<sup>2</sup> But in New Hampshire it is, with reason, held that where the public have no means of access to, and no occasion for, the use of a proposed new highway, it is no nuisance for the town in which it is located, not to build it and keep it in repair.<sup>3</sup>

§ 382. We have, heretofore, defined in general terms, the meaning of the words "defect," "insufficiency," "want of repair," &c., as they are used in statutes, making towns liable for injuries caused thereby.<sup>4</sup> It is clear, however, that what would constitute a serious defect in a highway of a certain character and location, might be a very inconsiderable defect, or none at all, in another highway.<sup>5</sup> What would be a safe and convenient road in the country might be a very unsafe and inconvenient street in a city. The necessity in a city street of a smooth pavement and even grade, and of a sufficient width to accommodate the exigencies of increased travel, does not exist in a country road.<sup>6</sup> Thus, while it will not be required of

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<sup>1</sup> *Tripp v. Lyman*, 37 Maine, 250.

<sup>2</sup> *Commonwealth v. Deerfield*, 6 Allen, 449.

<sup>3</sup> *State v. Rye*, 35 N. H. 368.

<sup>4</sup> *Ante*, § 369 *a*.

<sup>5</sup> The requisite strength of a bridge depends upon the extent and nature of the travel and business on the road. Thus, it ought in general to be strong enough to support a drove of cattle, driven over it with common care and prudence. It is not sufficient to excuse the party who is liable to maintain it, from liability for losses, to show that it would sustain the heaviest loaded teams (*Richardson v. Royalton &c. Turnpike Co.*, 6 Verm. 496).

<sup>6</sup> *Hull v. Richmond*, 2 Woodb. & M. 337; *Fitz v. Boston*, 4 Cush. 365. In the last



a country road that its whole width should be so wrought as to be every where passable for wheeled vehicles,<sup>1</sup> this will be required of a street in a city.<sup>2</sup> It may be doubted whether even width for the passage of more than one carriage will be required on a country road in places where ledges of rock, or other great natural obstacles interpose. The most that can be required, in a road of so difficult a nature, is that the sides should be in such a state as would admit of the passing of carriages when they meet, without unusual delay or trouble.<sup>3</sup>

§ 383. But in the case of a country road, as in that of a city street, travelers are not restricted to the use of the wrought and traveled path. They have a right to travel over the whole width of the road as laid out, and if unlawful obstructions or pitfalls are allowed to remain on the margin of the road, obstructing a passage thereon, the road is not safe and convenient as required by law.<sup>4</sup>

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case, the court charged that "a different state of repair would be required in a city, where a large amount and variety of travel was constantly passing, and in a country place, where the state of things was different." Held, that understanding "a city," a closely built place with a great amount of travel, as distinguished from a place of opposite character, the charge was not open to exception (and see *Providence v. Clapp*, 17 How. U. S. 161; *Loker v. Brookline*, 13 Pick. 343; *Drake v. Lowell*, 13 Metc. 292; *Slate v. Beeman*, 35 Maine, 242). In *Church v. Cherryfield* (33 Maine, 460), it was held proper for the jury to take into consideration the nature of the business of the town, "but such business forms only one of the facts, to be considered in connection with other facts in the case, and with the obligation of the town to keep the highway in a safe and convenient state of repair for the use of the inhabitants of other towns as well as its own."

<sup>1</sup> *Hull v. Richmond*, 2 Woodb. & M. 337. That was an action for damages against a town for an injury received on a highway, rendered difficult and dangerous to turn out on, through want of repair. Held, that the nature of the country, whether rough and hilly or smooth, the amount of travel, the places near on which carriages could be turned out, and the ordinary care exercised usually by towns on this subject, must determine whether the town was guilty of culpable neglect.

<sup>2</sup> See *Raymond v. Lowell*, 6 Cush. 524.

<sup>3</sup> *Howard v. North Bridgewater*, 16 Pick. 189; *Hull v. Richmond*, 2 Woodb. & M. 337, 343; *Kelsey v. Glover*, 15 Verm. 708; *Green v. Danby*, 12 Id. 338. See *Ireland v. Oswego &c. Turnp. Co.*, 13 N. Y. 526.

<sup>4</sup> See *Siddons v. Gardner*, 42 Maine, 248. In that case, Tenney, C. J., said:

Thus a large stone or log, lying within the road, but outside the traveled path,<sup>1</sup> and accumulations of snow on the margins of the road, rendering travel unsafe, are "defects," for injuries caused by which a town is liable.<sup>2</sup> If the usually traveled part of a highway is obstructed with

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"Any part of the highway may be used by the traveler, and in such direction as may suit his convenience or taste, provided he therein conforms to all laws and well-settled rules connected with such use." In *Johnson v. Whitefield* (18 Maine, 286), Shepley, J., said: "It is a mistake to suppose the public rights are restricted to the prepared and usually traveled path. While a town has done its duty when it has prepared a pathway of suitable width, in such a manner that it can be conveniently and safely traveled with teams and carriages, as required by the statute, the citizens are not thereby deprived of the right to travel over the whole width of the way as laid out, and they have a right to do so without being subjected to other or greater damages than may be presented by natural objects, or those occasioned by making and repairing the traveled path. \* \* \* To allow the sides of the road to be encumbered by logs or other things unnecessarily placed there would deprive the citizens of the use of the whole width of the way, or subject them to unnecessary dangers not contemplated by the laws." In *Morse v. Richmond* (41 Verm. 435), Steele, J., said: "It is well settled that it is the duty of towns to forbid and prevent the use of their highway margins as places of deposit for private property, whether it be lumber, shingles, logs, or other matter that may interfere with travel; and if they do negligently suffer the margins of their roads to become and remain unsafe by being thus incumbered, the party who, without fault on his part, meets with an accident by driving against them, may recover of the town" (see *Dimock v. Sheffield*, 30 Conn. 129; *Packard v. Packard*, 16 Pick. 191; *Shepardson v. Colerain*, 13 Metc. 56). A charge that there may be localities where it is the duty of a town to make the street safe for travel over the whole width laid out, was sustained in *Bryant v. Biddlefield* (39 Maine, 193). In *Seward v. Milford* (21 Wisc. 485), a charge that a traveler may presume that a road is reasonably safe in its surface and margin, was sustained. In *Rice v. Montpelier* (19 Verm. 470), it was remarked by the court that the extent of the responsibilities of towns, for defects and obstructions exterior to the wrought or traveled way, and for injuries suffered from such defects in the use of that portion of the way, is mainly a question of law, calling for special instructions from the court.

<sup>1</sup> *Bigelow v. Weston*, 3 Pick. 267; *Cogswell v. Lexington*, 4 Cush. 307; *Snow v. Adams*, 1 Cush. 443. In *Smith v. Wendell* (7 Cush. 498), however, it was held that a town is not liable for an injury occasioned to a traveler passing from a public highway to a railway station through a road opened by the proprietors of the railroad for that purpose, by a block of stone lying within the limits of the highway, as located, and obstructing the entrance to the road to the station, if it does not obstruct the road-bed of the highway. In *Young v. Yarmouth* (9 Gray, 386), it was held that a town is not liable for damages sustained by a traveler upon a highway, by reason of a telegraph post erected within the limits of the highway, in a place prescribed by the selectmen of the town.

<sup>2</sup> See *Barton v. Montpelier*, 30 Verm. 650.

snow, and the only way broken out is at the side, over a frozen ditch, the town is liable for defects in such way.<sup>1</sup> In a case where an open and well-beaten path led from the traveled path to an apparently safe and convenient watering-place by the side of the road, but within its limits, which was, in fact, a deep and miry pit covered with water, into which a traveler's horse, being turned there to drink, fell and was drowned, it was held that the town was liable.<sup>2</sup>

§ 384. Although an obstruction existing on the margin of a road may become a defect in the road itself, for which a town is liable, yet a traveler, who voluntarily and unnecessarily diverges from the traveled path, cannot recover for injuries sustained while traveling outside of such path.<sup>3</sup> Thus, where a traveler diverges from the traveled road without necessity, and merely for the purpose of obtaining a better road at the side, or where his horse takes that direction from a natural instinct, or from inability to see the road on account of the darkness, he must suffer the consequences.<sup>4</sup>

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<sup>1</sup> *Savage v. Bangor*, 40 Maine, 176.

<sup>2</sup> *Cobb v. Standish*, 44 Maine, 198. In that case, Weston, C. J., said: "Towns are not obliged to furnish watering-places for the public convenience, but, when they are provided by nature in the highway, they ought not to be suffered to become pitfalls, first to allure, and then to destroy horses or other animals turned aside to partake the refreshment to which they are thus invited" (and see *Ireland v. Oswego &c. Turnp. Co.*, 13 N. Y. 526).

<sup>3</sup> Towns are not generally bound to make all the land that is laid out as a highway passable; but if an obstruction outside of the traveled part renders the road unsafe, the town will be liable unless it has made proper safeguards or railings (*Willey v. Portsmouth*, 35 N. H. 303). Although the town will not be responsible if the traveler voluntarily diverges from the traveled path, and injury results, yet, if he is forced into the ditch by accident, and injury ensues by reason of an obstruction placed there, the town will be liable (*Cassedy v. Stockbridge*, 21 Verm. 391). Where the judge instructed the jury generally that the defendant was liable for a failure to keep the highway outside of the traveled path safe and convenient for travel, without more particularly defining such liability, though requested by the defendant so to qualify the instructions, a new trial was granted (*Kellogg v. Northampton*, 4 Gray, 65).

<sup>4</sup> *Rice v. Montpelier*, 19 Verm. 470. In that case, the plaintiff was traveling upon

§ 385. Sidewalks are parts of the public streets, and must be kept in a safe and convenient state of repair for public use throughout their whole width.<sup>1</sup> And so that part of the street which lies between the carriage-way and the sidewalk should be kept in such repair that foot-passengers may cross any part thereof with a reasonable assurance of safety. It has been held, that the establishing of raised crossings at proper distances is not a

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the highway, the traveled path of which was from twenty to thirty feet wide. In the ditch, and three feet from the outer edge of the traveled path, and about five or six feet from the fence, a hole had been dug, about three feet square and two feet deep, of which the highway surveyor had notice. Between the hole and the fence there was nothing but an elevated sidewalk. There was some snow upon the sides of the road, but none in the traveled path. Sleighs had been driven in the ditch, and had made a path there upon the snow at the place where the hole was dug. The plaintiff, passing along the highway in a dark night, with a horse and sleigh, ran into the hole, whereby his horse and sleigh was injured. Held, that the jury should have been instructed that, if they found that the plaintiff diverged from the traveled road without necessity, but merely for the purpose of having the benefit of snow, or that the horse took the same direction from a natural instinct, or from inability to see the road on account of the darkness, the town should not be held responsible for the consequences which ensued. And see *Dickey v. Maine Telegraph Co.*, 46 Maine, 483.

<sup>1</sup> *Bacon v. Boston*, 3 Cush. 174; *Bloomington v. Bay*, 42 Ill. 503; *Wallace v. Mayor &c. of N. Y.*, 2 Hilt. 440. In the last case, Daly, F. J., said: "The sidewalk is a part of the public street, designed for the use of those who travel on foot, and though the corporation may impose upon the owners of lots fronting upon the streets or avenues the burden of paving and keeping the sidewalks in repair, they do not thereby relieve themselves of the duty imposed upon them, by charter and by statute, of altering, amending, and keeping in repair the streets and highways within the city." In *Hall v. Manchester* (40 N. H. 410), it appeared that the injury complained of happened to the plaintiff by reason of a fall on the sidewalk of the highway ordinarily used by foot-passengers, occasioned by cutting a ditch in the ice thereon, for the purpose of conveying water into a side gutter of the main street of the city. Held, that the sidewalk was a component part of the highway; that it was for the jury to determine whether it was in suitable repair or otherwise; and that the city was properly liable for an injury sustained from a defect in said sidewalk, provided the defect was one of which the city could reasonably have had knowledge, and the plaintiff, on her part, was in the exercise of due prudence and care. In *Raymond v. Lowell* (6 Cush. 524), it was held, that the projection of the movable grating of a culvert from one to two inches above the level of the edge of the sidewalk, against which it rested, was not a defect showing such a want of ordinary care on the part of the city as would make it responsible for an injury occasioned by stumbling over the grating.

sufficient compliance with this duty.<sup>1</sup> Under a statute requiring a city corporation to keep in repair "all the streets, highways, and roads" within the city limits, the obligation of the city to make sidewalks along its streets must depend mainly upon whether the safety or convenience of the public in passing along the streets requires it.<sup>2</sup>

§ 386. Where, as in Massachusetts, towns are required to keep their highways in such repair as to be *safe* and convenient for travel, it would seem that every thing which renders a highway unsafe makes it defective within the meaning of the statute. The duty is not confined to making the surface of the ground safe; but any objects, such as the branches of a tree, or an old and rotten awning,<sup>3</sup> projecting over a sidewalk from the adjoining premises, which are likely to render travel on the road-bed unsafe, are nuisances which the town is bound to remove. But, in such a case, it would seem reasonable to add that the use of the way must necessarily co-operate with the nuisance in producing the injury. If the two combined will necessarily or probably result in harm, it seems fair

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<sup>1</sup> *Raymond v. Lowell*, 6 Cush. 524. Trees planted by a landowner between the carriage-path and sidewalk are not nuisances (*Graves v. Shattuck*, 35 N. H. 257).

<sup>2</sup> *Manchester v. Hartford*, 30 Conn. 118.

<sup>3</sup> *Drake v. Lowell*, 13 Metc. 292; *Day v. Milford*, 5 Allen, 98; and see *Milford v. Holbrook*, 9 Id. 17. But in *Hixon v. Lowell* (13 Gray, 59), the court refused to extend the operation of the principles of that decision to a case where the only defect in the highway was the projection, from the roof of a building, of a mass of snow and ice which had gradually collected upon it, and had slid and been pressed forward by the snow above it until it overhung the traveled way, and rendered passing beneath it dangerous. In that case, the court said: "In most cases, the town has discharged its duty when it has made the surface of the ground over which the traveler passes sufficiently smooth, level, and guarded by railings, to enable him to travel with safety and convenience by the exercise of ordinary care on his own part. There may be many causes of injury, to which he might be exposed in traveling upon such a way, which would not constitute any defect or want of repair in the way itself. The town, if it has done its duty in making the way safe and convenient in all the proper attributes of a way, is not obliged to insure the safety of those who use it."

to presume that the legislature intended to make the town responsible for the removal of the nuisance.

§ 387. But where, as in Connecticut, towns are not bound to keep their highways *safe*, but only to maintain them in good and sufficient repair, it has been held, that a town is not liable for injuries sustained by a traveler from a nuisance not connected with the road-bed or the public travel thereon. Thus, where a traveler along a sidewalk was struck on the head and killed by the falling of an insecure awning blown down by the wind, it was held that the town was not liable, for the reason that, though a nuisance, the awning did not necessarily render travel unsafe. The use of the way did not necessarily conduce to the injury.<sup>1</sup>

§ 388. Some discussion has arisen as to whether a town which is required to keep its highways in "good and sufficient repair," and is made liable for special damages sustained by reason of their "insufficiency or want of repair," is bound to remove objects deposited upon the highway, the natural effect of which is to occasion accidents by frightening horses of ordinary gentleness. There would seem to be scarcely any room for doubt that a highway thus obstructed is not in a condition of reasonable safety for travel; and the courts of Vermont, New Hampshire, and Connecticut have uniformly so held. Thus, where a town suffered burning hay,<sup>2</sup> piles of lumber,<sup>3</sup> or other material,<sup>4</sup> to remain on the margin of a highway in a manner

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<sup>1</sup> Hewison v. New Haven, 34 Conn. 136.

<sup>2</sup> Morse v. Richmond, 41 Verm. 435. In that case, it was said that towns are held to a higher degree of diligence in removing objects unlawfully placed in the highway by private persons, than in removing equally dangerous natural objects incident to the region or thrown upon the margin in constructing the road.

<sup>3</sup> Winship v. Enfield, 42 N. H. 199; Chamberlain v. Enfield, 43 Id. 358; Littleton v. Richardson, 32 Id. 59.

<sup>4</sup> The case of Dimock v. Suffield (30 Conn. 129), was an action for an injury

calculated to frighten horses, it was held liable. In a recent case in New Hampshire,<sup>1</sup> it was laid down that objects suffered to remain resting upon one spot, or confined within one particular space within the highway, if they are of such a shape or character as to be manifestly likely to frighten horses of ordinary gentleness, constitute "obstructions" or "insufficiencies," for which the town is liable. The obstruction in that case was a pig-sty projecting into the highway, and occupied by five swine, the declaration alleging that the horse was frightened by the swine "starting and running about," and by certain loud noises which the swine then and there uttered. Some recent decisions in Massachusetts tend to a different conclusion, but they stand alone, and their reasoning does not enforce our conviction of their soundness.<sup>2</sup> There can be

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received by the plaintiff's horses taking fright at some white plastering on the margin of the road, piled up nearly to the height of the road-bed, but so as to be "in no manner an obstruction to the public travel, except so far as it might frighten horses." The point was distinctly made by the defendants, that the town could not be held liable for a defect of that nature. Hinman, C. J., said that whether any duty devolved upon the town with reference to the pile of plastering, "depends upon whether it was, in its general operation, calculated to frighten horses of ordinary gentleness." He also adds: "There can be no doubt that a road may be rendered unsafe by objects upon it calculated to frighten animals;" but "whether a slight discoloration by the side of the road, such as was caused in this case by the plastering that lay there, was in fact an object calculated to frighten horses which are usually gentle, and therefore fit to be driven, is an entirely different question." It appeared in that case that the plaintiff's horse was shy and timid, and a decision against the plaintiff was advised, upon the ground that there was "heedlessness amounting to negligence on the plaintiff's part, which was the cause of the injury, and that, with the exercise of reasonable care, he would have passed the object." It was also said by Carpenter, J., in *Hewison v. New Haven* (34 Conn. 136), that "any object upon or near the traveled path, which in its nature is calculated to frighten horses of ordinary gentleness, being likely to obstruct the right of way, may constitute a defect in the way itself."

<sup>1</sup> *Bartlett v. Hooksett*, referred to in 8 Am. Law Reg. 93 n.; compare *Ray v. Manchester*, 46 N. H. 59.

<sup>2</sup> In *Keith v. Easton* (2 Allen, 552), a town was held not liable for the result of fright caused to horses from an itinerant daguerrean saloon standing on the margin of the road. The case was not left to the jury, as we think it should have been. In *Kingsbury v. Dedham* (13 Allen, 186), a pile of gravel fifteen inches high was, on the same day of the accident, placed on the road to be spread over the surface in

no question that an individual who does any thing likely to frighten the horse of a traveler is liable in damages for the injuries caused thereby. Thus, the act of exploding fire-crackers in a public street is wrongful and unlawful (even on the Fourth of July), and if any injury results therefrom, the injured person has a remedy against the wrong-doer.<sup>1</sup>

§ 389. In general, a town is not liable for an injury sustained by a traveler while straying outside of the limits of the highway, when the highway is safe and convenient to travel upon; nor, as a general rule, are towns obliged to maintain fences merely to prevent travelers from straying out of the highway.<sup>2</sup> It has been held even that a town is not liable for injuries happening on a ford-way lying out of the limits of the highway, though used with the consent of the land-owner, by reason of its neglect to repair a bridge.<sup>3</sup>

§ 390. Although a town is not, as a general rule, bound to fence its highway so as to prevent travelers from straying out of its limits, yet where the limits of a highway are not indicated by any visible objects, and there is nothing to show a traveler in the evening that the course he is pursuing is not within the way intended for public

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the ordinary course of repairs. In *Cook v. Charlestown* (13 Allen, 190 n.), a dead horse was allowed to remain in the highway, and the town was held not liable for the results of its causing the plaintiff's horses to be frightened. But the opinion of the court is not reported, and it is doubtful what the precise ground of the decision was. In *Lund v. Tyngsborough* (11 Cush. 563), though a new trial was granted, it was held that the plaintiff might recover without proving actual contact with the defect, and although the fright of the horse contributed to the accident; but the recent decision of *Horton v. Taunton* (97 Mass. 266) seems to have qualified this to some extent, for, if a town is not bound to guard against fright, it should not be against its consequences.

<sup>1</sup> *Conklin v. Thompson*, 29 Barb. 218.

<sup>2</sup> *Sparhawk v. Salem*, 1 Allen 30.

<sup>3</sup> *Hyde v. Jamaica*, 27 Verm. 443; *Tisdale v. Norton*, 8 Metc. 338; compare *Vale v. Bliss*, 50 Barb. 358; *Norwich v. Breed*, 30 Conn. 535.



travel, the town is liable for injuries resulting from a defect within the general course and direction of travel, although without the limits of the located way, if so near the located way as to render traveling there dangerous, and there is nothing to give travelers notice of the defect until too late to avoid it.<sup>1</sup> In general, whether a railing or light at any part of a road is necessary, is a question of fact for the jury.<sup>2</sup>

§ 391. Where a rail or barrier is necessary for the proper security of travelers at places on the road which from their nature would be otherwise unsafe,<sup>3</sup> and the maintenance of which would have prevented the happening of injury,<sup>4</sup> it is negligence not to construct and

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<sup>1</sup> *Hayden v. Attleborough*, 7 Gray, 338; *Davis v. Hill*, 41 N. H. 329. Where a traveler on a highway, while in the exercise of ordinary care, received an injury by driving his wagon against a post; and it appeared that the line of the highway was not indicated by any visible objects; that the post which occasioned the injury was near the line of the highway, and within the limits of the general course and direction of the travel, and where travelers were accustomed to pass, and rendered the traveling dangerous, and there was nothing to indicate that the post was not in the way intended for public travel; and that the town, though it had reasonable notice of the course of travel, and that the post was dangerous to travelers, suffered it to remain an unreasonable time, it was held that the town was liable, under the statute, for the injury sustained by the plaintiff (*Coggswell v. Lexington*, 4 Cush. 307; see *Tuttle v. Holyoke*, 6 Gray, 447; compare *Sparhawk v. Salem*, 1 Allen, 80). In rebuilding the University of Edinburgh, a pit was dug, to the depth of about fifteen feet, in one of the adjacent streets. This was railed round, except on one side, where there were two fixed posts, across which bars were usually fixed at night. The plaintiff fell into this pit, in consequence of an omission to put up the bars, and was injured. It was held that the city corporation was liable (*Innes v. Edinburgh*, Hay, 1).

<sup>2</sup> *Bartlett v. Vaughan*, 6 Verm. 243.

<sup>3</sup> *Kimble v. Bath*, 38 Maine, 219; *Palmer v. Andover*, 2 Cush. 600; see *Rex v. Landillo Roads*, 2 T. R. 232; *Hunt v. Pownal*, 9 Verm. 411. In *Collins v. Dorchester* (6 Cush. 396), the jury were instructed that towns were not ordinarily bound by law to fence their roads, but were afterward instructed that towns were bound to erect fences or railings at places which would otherwise be unsafe or inconvenient for travelers exercising ordinary care. Held, that there was no legal exception to the instruction. In *Radway v. Briggs* (37 N. Y. 266), the lessee of a public pier was held bound to maintain safe and proper string-pieces for the pier.

<sup>4</sup> And though the act of a third person concur in causing the accident, this will not excuse the omission of the town to build a railing. Thus, a person pushed from

properly maintain such a barrier.<sup>1</sup> Thus, it is gross negligence to construct a passage-way along a precipice without having sufficient guards for the protection of travelers.<sup>2</sup> So, where a road is so constructed as to present at one point two paths, both of which exhibit the appearance of having been used by travelers, and one of them leads to a dangerous precipice, while the other is safe, it is the duty of those having charge of the road to indicate in a manner not to be mistaken, by day or by night, that the unsafe path is to be avoided; and, if this cannot be otherwise done, to put up such an obstruction as will turn the traveler from the wrong

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a public street down an unguarded and dangerous declivity by a crowd, if not done through the willful act or negligence of the crowd or any person in it, may maintain an action against the city for his injuries (*Alger v. Lowell*, 3 Allen, 398). But otherwise, if the injury was caused by the combined effect of the unsafe condition of the street, and the unlawful or careless act of a third person (*Shepherd v. Chelsea*, 4 Allen, 118; *Richards v. Enfield*, 13 Gray, 344; *Lowell v. Lowell*, 7 Gray, 100; see *ante*, § 42). In New Hampshire it has been held that where, by accident, one drove his carriage to the left of the center of the traveled path, in consequence of which he came in collision with an approaching carriage, and was forced off a bridge which had no sufficient railing, the town was liable (*Norris v. Litchfield*, 35 N. H. 271).

<sup>1</sup> *Chicago v. Gallagher*, 44 Ill. 295. In Massachusetts it is held that the want of a railing at the side of a highway, when necessary to the security of travelers, is a "deficiency" in the way, within the meaning of the statute of that state (*Hayden v. Attleborough*, 7 Gray, 338). The New Hampshire statute has received the same construction (*Davis v. Hill*, 41 N. H. 329; *Willey v. Portsmouth*, 35 Id. 303; *Morris v. Litchfield*, 35 Id. 271). In Maine, where an indictment against a town, for loss of life by a defect in a highway, alleged that the defect had been continued without any sufficient fence, and without any sufficient light in the night time, to prevent the injury and damage that might happen, it was held that this allegation, not being material to a perfect description of the offense, need not be proved (*State v. Bangor*, 30 Maine, 341).

<sup>2</sup> "It does not require an expert to show that a narrow passage-way along a precipice of twelve feet, where a misstep or the slightest accident may precipitate the traveler headlong therefrom, is not the degree of safety and security which the law requires" (*Joliet v. Verley*, 35 Ill. 58). The plaintiff was driving along a part of the road, on one side of which was a deep declivity over a creek, and on which was no railing or guard. His horse becoming frightened at some lights near by, backed over into the creek and was injured. The town corporation was held liable under its general obligation to keep its roads in repair (*Hyatt v. Rondout*, 44 Barb. 385).

track.<sup>1</sup> But neither towns<sup>2</sup> nor toll-bridge corporations<sup>3</sup> are bound to erect and maintain railings upon their bridges for travelers to lean against or rest upon; and a person using them for such purpose does so at his own risk.

§ 392. On the same principle that barriers may be necessary by day, lights by night may also be found requisite for the safety of a road. Thus, a provision in the charter of a toll bridge company that the bridge should "at all times be kept in good, safe, and passable repair," requires the company to light the bridge, if the jury find such lighting necessary to make the bridge safe and convenient for passage at night.<sup>4</sup>

§ 393. It is manifest that a town which is bound to provide for the safety of travelers ought particularly to guard against the happening of accidents at railroad crossings.<sup>5</sup> The fact that the railroad company is bound by statute not to impede or obstruct the safe and convenient use of any highway across which it may pass, will not exempt the town from liability.<sup>6</sup> It would be, however,

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<sup>1</sup> Ireland v. Oswego &c. Turnpike Co., 13 N. Y. 526; Cobb v. Standish, 14 Maine, 198; see the last case commented on in Rice v. Montpelier, 19 Verm. 470.

<sup>2</sup> Stickney v. Salem, 3 Allen, 374; see Stinson v. Gardiner, 42 Maine, 248.

<sup>3</sup> Orcutt v. Kittery Point Bridge Co., 53 Maine, 500.

<sup>4</sup> Commonwealth v. Central Bridge Co., 12 Cush. 242; see Worcester v. Canal Bridge Co., 16 Pick. 541.

<sup>5</sup> Davis v. Leominster, 1 Allen, 182. In that case, the town was held liable for an injury from a pile of sleepers placed within that portion of the highway covered by the location of the railroad by the servants of the company, upon the ground that the sleepers could have been removed by the town without interfering with the authorized construction and operation of the railroad (see Phillips v. Veazie, 40 Maine, 96).

<sup>6</sup> Wellcome v. Leeds, 51 Maine, 318; Currier v. Lowell, 16 Pick. 170. In the last case, the statute authorizing the construction of the railroad, provided that the selectmen of the town, in case the railroad was not constructed at the point of intersection with the highway in a manner satisfactory to them, might require any alteration or amendment which they might think necessary, and if the company did not comply with the requirements, might make the alteration or amendment themselves,

as has been remarked, impracticable to require towns to keep their highways entirely passable during the construction of a railroad at the point of their intersection. The most that ought to be required of the town in such a case is that it should provide a suitable by-way for the public, and warn them against passing upon the highway while it remains unsafe by reason of the operations of the railroad company in the construction of its road.<sup>1</sup> Therefore, if the town has made the crossing safe and convenient, except so far as it was impracticable to do so without interfering with the railroad, it is not liable.<sup>2</sup>

§ 394. It has been held in Massachusetts that where the highway is not crossed at its level, but the railroad company carries the highway over the track by a bridge, which it is required by statute to keep in repair, the town is not liable for a defect in such bridge.<sup>3</sup> But a contrary rule has been adopted in Maine, where it has been held that the town is primarily liable for a defect in such a bridge, but may have a *mandamus* against the railroad company to compel it to repair, or an action to recover reimbursement for repairs made by the town.<sup>4</sup>

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and be entitled to a remedy over against the railroad corporation for the expenses thereof. It was held that the town was liable, notwithstanding it had given notice to the superintendent of the work on the railroad that a barrier must be put up for the protection of travelers on the highway, which the latter had promised, but neglected to do (compare *Sawyer v. Northfield*, 7 Cush. 490). The privity is between the traveler and the town, and the latter, having been made liable to the former, has an action over against the railroad company (*Lowell v. Boston & L. R. Co.*, 23 Pick. 24; *Winship v. Enfield*, 42 N. H. 197; *Duxbury v. Vermont Central R. Co.*, 26 Verm. 751; see *post*, § 419).

<sup>1</sup> *Willard v. Newbury*, 22 Verm. 458.

<sup>2</sup> *Jones v. Waltham*, 4 Cush. 299; *Vinal v. Dorchester*, 7 Gray, 421; *Beatty v. Duxbury*, 24 Verm. 155; *Barber v. Essex*, 27 Id. 62; see *Kimball v. Bath*, 38 Maine, 219.

<sup>3</sup> *Sawyer v. Northfield*, 7 Cush. 490.

<sup>4</sup> *State v. Gorham*, 37 Maine, 451.

§ 395. A good deal of discussion has arisen in the New England courts as to the liability of towns for obstructions of highways from natural causes, such as the fall of snow and accumulations of ice, blocking the way or impeding travel. It has been uniformly held that such obstructions are as much defects as any other species of obstruction, and that towns are, under their statutory obligation, bound to remove them or render them harmless.<sup>1</sup>

§ 396. In regard to that part of the way traveled by vehicles, it would seem that the treading down of snow when it falls in great depth, or in case of drifts, so that the way is not actually blocked up, uneven, or incumbered, may, in some sense, and for the time being, have the effect to remove the obstruction.<sup>2</sup> But, in the case of sidewalks,

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<sup>1</sup> *Providence v. Clapp*, 17 How. U. S. 161; *Loker v. Brookline*, 13 Pick. 346; *Holman v. Townsend*, 13 Metc. 297; *Dutton v. Ware*, 17 N. H. 34. A town is liable for an injury to a traveler upon one of its highways, which is occasioned by the accumulation of a snow-drift thereon, if, notwithstanding the drift, the injury would not have happened had the traveled path in the highway been kept sufficiently wide and in proper condition. If it was not in that condition, or of proper width, when the accident happened, the fact that sufficient time had not elapsed after the accumulation of the drift to allow of its removal by the town before the accident happened, will not excuse the town from liability (*Barton v. Montpelier*, 30 Verm. 650; see *Green v. Danby*, 12 Verm. 338; *State v. Fryeburg*, 15 Maine, 405; and *Church v. Cherryfield*, 33 Id. 460). Covering a part of a bridge which the defendants are bound to keep safe and convenient for travelers, does not make it their legal duty to cover the whole of it with snow. And no exception lies to a refusal to instruct the jury, in an action against the proprietors of a bridge which was partly covered with snow, to recover for an injury received from a collision thereon between the plaintiff's sleigh and another sleigh, that the omission to cover the whole bridge with snow, or so much of it as would make a snow-track wide enough for two sleighs, rendered it out of repair, unsafe, or inconvenient, or was evidence from which the jury might so find (*Chase v. Cabot &c. Bridge Co.*, 6 Allen, 512). A municipal corporation is liable for damages caused by a fall upon ice lying upon a sidewalk, of which the city government had, or might have had, timely notice, and which might have been removed by it, in the exercise of due care, before the accident happened. And it is no defense that city ordinances existed requiring its removal by the owner of the adjacent premises (*Baltimore v. Marriott*, 9 Md. 160; see *Wallace v. Mayor &c. of N. Y.*, 2 Hilton, 440). The existence of snow or ice in a highway should put the traveler on his guard, and he must use ordinary care in determining whether to proceed or return; and if guilty of negligence in proceeding, he cannot recover (*Horton v. Ipswich*, 12 Cush. 488).

<sup>2</sup> *Providence v. Clapp*, 17 How. U. S. 161. Nelson, J., said: "It is conceded that

this cannot be said to be a sufficient remedy for the evil.<sup>1</sup> Whether any thing but absolute and total removal of the snow from the sidewalk, or whether the use of adequate means to make the way safe and convenient, such as the sprinkling of ashes on a slippery sidewalk, would be a compliance with the statutory requirements, is more a question of fact for the jury than of law for the court.

§ 397. The mere fact that a highway is *slippery* from ice upon it, so that one passing over it is liable to slip and fall upon it, while using ordinary care, has been held, in Massachusetts, not to be such a defect or want of repair, as will warrant a jury in finding that it is not safe or convenient within the statute, if the street was properly constructed, and the accumulation of ice and snow was not so great as to constitute an obstruction, and there was nothing in the style of construction to specially occasion the formation or accumulation of ice upon it.<sup>2</sup> In a recent case<sup>3</sup> the rule has been stated to be, that, on the one hand, a way properly constructed, and kept in such condition as to be rea-

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an obstruction from falls of snow or accumulations of ice must be removed by the towns or cities, so as to make the highways and streets passable, and that this is a duty enjoined upon them. The question is, what sort of removal will satisfy the requirement of the statute? \* \* \* The counsel for the defendant suggests that, as it respects such safety and convenience for travelers in case of falls of snow, the statute should be construed as meaning merely that the snow should be trodden down or removed, so that the highways and streets should not be so blocked up or incumbered as not to be safely and conveniently open and passable. \* \* \* The suggestion may be very well as an argument to the jury for the purpose of satisfying them that the repairs, in the manner mentioned, were such as to fulfill the requirement of the statute, but to lay it down as a rule of law, in the terms stated, might, in many cases and under the circumstances, fall far short of it."

<sup>1</sup> "The treading down of snow, when it falls in great depth, or in case of drifts, so that the highway or street shall not be blocked up or incumbered, may, in some sense and for the time being, have the effect to remove the obstruction; but as it respects the sidewalks and their uses, this remedy would be, at best, temporary; and in case of rains or extreme changes of weather, would have the effect to increase rather than remove it" (Providence v. Clapp, 17 How. U. S. 161).

<sup>2</sup> Stanton v. Springfield, 12 Allen, 566.

<sup>3</sup> Luther v. Worcester, 97 Mass. 268.

sonably safe and convenient for travel at all seasons of the year, will not become defective and out of repair by reason of the fact that it was covered with a smooth and even surface of ice, which rendered it slippery, and so made persons passing over it liable to fall down; but that, on the other hand, a town omitting to take due precautions against the accumulations in the highway of ice or snow in drifts or ridges, or its being in such a condition from unevenness or roughness, or other causes, as, combined with its slippery nature, would render it unsafe and dangerous to passengers, is liable for the consequences.<sup>1</sup> And where ice had been suffered to remain in the street after being trodden down into a narrow ridge, presenting an oval or slippery surface, raised above the other parts of the way from which the snow had been removed, it was held to be "unsafe and defective," not solely because it was slippery from ice, but because it had become rough and uneven from artificial causes to such an extent as, in connection with its slippery surface, to create a defect in the way within the meaning of the statute.<sup>2</sup> If the usually-traveled path of a highway is obstructed with snow, and the only way broken out is at the side over a frozen ditch, the town is liable for defects in such way. And the occurrence of a rain and a thaw is sufficient notice to the town of its unsafe condition.<sup>3</sup>

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<sup>1</sup> "It was not intended [in *Stanton v. Springfield*, *supra*] to restrict the liability of cities and towns so as to exclude cases of injury happening by reason of the accumulations of ice or snow in the streets or ways in ridges or drifts, or in consequence of snow or ice being permitted to remain in a rough and uneven condition" (per Bigelow, C. J., *Luther v. Worcester*, 97 Mass. 268).

<sup>2</sup> *Ib.* In *Hutchins v. Boston* (97 Mass. 272, *note*), the alleged defect consisted of a mass of ice extending from the curbstone across the sidewalk, being about four inches high in the middle of the sidewalk, and sloping each way, so that at the curb and at the building it was much thinner. During three or four days preceding the accident there had been snow, rain, hail, and frost, and water falling from the eaves of the building had accumulated and frozen on the sidewalk, rendering the surface of the ice round and uneven. The way was held "defective" within the meaning of the statute.

<sup>3</sup> *Savage v. Bangor*, 40 Maine, 176.

§ 398. Where a defect (as, for example, the sinking of stones below the surface) is caused by the action of the frost, the town is nevertheless liable.<sup>1</sup> But it should be remarked that towns are not insurers against accidents and injuries, caused by latent defects in highways, that could not have been avoided or discovered by the use of ordinary care and prudence on their part; and where the ground gave way under a traveler, through some latent defect under the ground, which was not known or discoverable, the town was held not liable for the injury.<sup>2</sup>

§ 399. Some question has arisen as to whether towns are bound, under their obligation to repair, to rebuild highways or bridges which have been entirely destroyed by natural causes. The common law of England does not impose any duty upon a parish to rebuild a highway which has been wholly destroyed by the elements, or by the operation of natural causes, over which the parish had no control, as where the soil of the road-bed has been entirely swept away by a flood, or a bridge totally destroyed by fire.<sup>3</sup> The common law obligation of turnpike companies

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<sup>1</sup> *Tripp v. Lyman*, 37 Maine, 250.

<sup>2</sup> *Prindle v. Fletcher*, 39 Verm. 255. In New Hampshire, it is held that if an obstruction exists by reason of an inevitable accident, without fault or neglect on the part of any person, it is not an obstruction within the meaning of the statute, unless the town had notice of it, expressed or implied, and reasonable opportunity, by the exercise of proper care and vigilance, to have removed it before the accident occurred (*Johnson v. Haverhill*, 35 N. H. 74). In *Chamberlain v. Enfield* (43 N. H. 356), it was held to be settled law in New Hampshire, that where the cause of the accident and injury to the plaintiff is such that the town could not have removed or remedied the cause, or have prevented the accident, the town will not be liable. And it makes no difference whether the accident was caused by the act of Providence or by the negligent or malicious act of man, or by a combination of these causes (and see *Palmer v. Portsmouth*, 43 N. H. 265).

<sup>3</sup> *Regina v. Hornsea*, 1 Dear. C. C. 291; 18 Jur. 315; 25 Eng. Law & Eq. 582. In that case a public highway originally ran down to the sea at right angles to the shore, the land gently sloping to the water's edge. By the encroachment of the waves, a portion of the land and road was swept away, so that there was left a cliff twenty feet high above the beach, the road running to the edge and there terminating abruptly. It was held, that as the substance of the road was gone beyond the



and other owners of road franchises is different. They are bound to render their roads and bridges *passable*, and it is no excuse for failure to do so, that they were rendered impassable by a sudden flood or other irresistible causes. They are bound to rebuild within a reasonable time.<sup>1</sup> Under a statute requiring the *maintenance* of roads and bridges, and imposing a liability for the consequences of "defects" therein, it is held that there is no distinction between the case of a defect produced by natural causes and a defect produced by the agency of man, either with or without his fault.<sup>2</sup> And towns are bound to rebuild

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edge of the cliff, there was no road beyond that point which the parish could be called upon to repair, and that they were not bound to provide any means of communication between the top of the cliff and the beach. Maule, J., said: "We are clearly of opinion that there is no highway to repair. There appears to have been a road running down to the sea; natural causes, without the fault of any one, have washed away and destroyed the road, in great part, so that where that has taken place, the subject of repair no longer exists. \* \* \* That part of the highway which exists is in good repair, and that which is not passable could not be made good without considerable engineering works, which I think the parish were not bound to execute." In *Regina v. Paul* (2 Mood. & Rob. 307), parishioners were indicted for non-repair of a highway which ran along the top of a quay on the seashore; part of the quay had been washed away by the sea, leaving a gap which broke off the communication. Maule, J., said: "Whatever might be the duty of the parish as to a road so in existence and requiring repair, I do not think they are defaulters on this evidence. The interruption of the passage is not from the want of repair, but from the sea having washed away the wall or embankment, and there is no longer any thing for them to repair" (see *Rex v. Montague*, 4 Barn. & Cr. 598). In *Regina v. Bamber* (5 Q. B. 279), on an indictment for non-repair of a highway, alleging liability *ratione tenuræ*, it appeared that the sea from time to time had encroached upon the highway, so that a portion of the land over which it went was covered by the sea, and impassable, and the earth and soil were swept away. Denman, C. J., said: "All the materials of which a road could be made have been swept away by the act of God. Under these circumstances, can the defendant be liable for not repairing the road? We want an authority for such a proposition; and none has been found." In a case where a public way crossed the bed of a river, which washed over it at every high tide, and left a deposit of mud, it was thought that the parish was not bound to make it good, though the point was not expressly adjudged (*Rex v. Landulph*, 1 Mood. & Rob. 393).

<sup>1</sup> *People v. Hillsdale Turnp. Co.*, 23 Wend. 254.

<sup>2</sup> *Palmer v. Portsmouth*, 43 N. H. 265. See *Chamberlain v. Enfield*, Id. 356. In New York, in case of any road or bridge being damaged or destroyed by the elements or otherwise, the commissioners are authorized to cause the same to be immediately repaired or rebuilt at the expense of the town (Laws of 1858, ch. 103; as

bridges or roads destroyed or injured by the elements, without unreasonable delay.<sup>1</sup> It is no justification for an unreasonable delay in rebuilding that there is a contiguous road, in good repair, which the traveler might have taken.<sup>2</sup> Pending the work of rebuilding, if the public is put upon its guard, the town will be excused for the defective condition of the highway.<sup>3</sup>

§ 400. A town or municipal corporation which directly authorizes an interference with a highway by another does so at its peril. It is not released from its obligation to exercise a supervision over the work which it has authorized another to do for his own benefit, any more than over work which it does itself for the benefit of the public.<sup>4</sup>

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amended Laws of 1865, ch. 442, p. 801). Before the passage of this statute, it was held that commissioners were not bound to rebuild a bridge in the town, unless they had funds, or the means of procuring them (*People v. Hudson*, 7 Wend. 474; *Bartlett v. Crozier*, 17 Johns. 439; *People v. Adsit*, 2 Hill. 619; *Barker v. Loomis*, 6 Id. 453; *Smith v. Wright*, 27 Barb. 621; reversing S. C., 24 Id. 170).

<sup>1</sup> *Briggs v. Guilford*, 8 Verm. 264; *Clark v. Corwith*, 41 Verm. 449.

<sup>2</sup> *State v. Fryeburg*, 15 Maine, 405; *Frost v. Portland*, 11 Id. 271. As to what delay will be held to be unreasonable, see *Boxford v. Essex*, 7 Pick. 337.

<sup>3</sup> *Kimball v. Bath*, 38 Maine, 219 see *Blaisdell v. Portland*, 39 Id. 113; see *ante*, § 376.

<sup>4</sup> *Wendell v. Troy*, 39 Barb. 329, affirmed, 4 Keyes, 261; *Storrs v. Utica*, 17 N.Y. 108; *Hickok v. Plattsburg*, 16 Id. 161. The city of Detroit contracted for the construction of a sewer through a public street, the contract binding the contractor to keep the excavation fenced in and guarded properly, for public safety, and providing that he should be liable for damages from accidents happening through his neglect. Held, that, nevertheless, the city was liable for damages to one who fell into the excavation for want of proper guards (*Detroit v. Corey*, 9 Mich. 165). Where a city corporation, in opening a sewer through a public street, threw the earth removed on the sidewalk and left it there without placing over it any light or guard at night, it was held liable to one who, while endeavoring to pass through the obstruction, was precipitated by the caving of the earth into a cellar that was being dug in the adjoining lot (*Grant v. Brooklyn*, 41 Barb. 381). *Brown, J.*, said: "The defendant had undertaken a work which necessarily rendered the street unsafe for night travel. The danger arises from the very nature of the improvement; and as the streets and thoroughfares of a great city are in constant use by passengers, during the night as well as the day, the corporation are bound to avert these dangers by special precautions, such as signal lights and barriers, and even more than these, should they prove inefficient to prevent disaster" (*Ib.*) Where, in the course of cleaning a sewer, a hole was dug, and, in consequence of its being left open and unguarded at night, the horse of the plaintiff fell into it and was killed, it was held that the corporation was liable (*Lloyd v. Mayor &c. of New York*, 5 N. Y. 369).

Thus, where a railroad company had, in laying its track along a street, under an authority from the city, left a deep chasm in the street, into which a traveler was precipitated, it was held that the city was liable for the injuries sustained.<sup>1</sup> And so where a city allows abutters to excavate the street, and to lay pipes from the main water pipe therein to their houses, it is liable to one injured by reason of the improper manner of excavating and filling up the street,<sup>2</sup> or in consequence of a neglect to erect proper fences, or put up proper lights at night, so as to prevent travelers from falling over or being injured while the work is in progress.<sup>3</sup> It is no defense to the city in such a case that there were other streets by which the person injured might have reached the point he was aiming at when he was injured, if it did not give notice and warning by closing up the street out of repair, or in some other way.<sup>4</sup> But a town is not liable for an injury caused by the

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<sup>1</sup> *Hutson v. Mayor &c. of New York*, 5 Sandf. 289; affirmed 9 N. Y. 163. See *Lowell v. Boston & Lowell R. Co.*, 23 Pick. 24.

<sup>2</sup> *Baltimore v. Pennington*, 15 Md. 12.

<sup>3</sup> *Milwaukee v. Davis*, 6 Wisc. 377. See *Conrad v. Ithaca*, 16 N. Y. 158, 161, and note; *Hart v. Brooklyn*, 36 Barb. 227; *Congreve v. Morgan*, 5 Duer, 495; *Nelson v. Verm. & Canada R. Co.*, 26 Verm. 717. See *ante*, §§ 142, 149, 154. And generally, under the statutes imposing a liability upon towns for defective highways, a town is liable for special damage occasioned by an obstruction, either lawfully or unlawfully placed in a highway within a town by a third person, which it allows to remain and incumber the way (*Elliott v. Concord*, 7 Foster, 204; *Willard v. Newbury*, 22 Verm. 458; *Batty v. Duxbury*, 24 Verm. 155; *Barber v. Essex*, 27 Id. 62). In *Merrill v. Wilbraham* (11 Gray, 154) a town was held liable for injuries occasioned by a ditch dug in the highway by an aqueduct corporation, under license from the selectmen, and left open twenty-four hours. In an action against a city for loss of life by a defect in a highway, the jury were instructed "that the defendants would be justified against the accident by showing the hole or pit complained of to be properly fenced or lighted for protection against accident. And defendants would be bound to show such circumstances of protection." Held, that these instructions could not be excepted to by the defendants (*State v. Bangor*, 30 Maine, 341). A town, placing at sunset, around a well opened in the highway, such barriers as to make it safe for the night to persons using ordinary care, are not responsible for an injury suffered during the same night by a foot passenger, by reason of the removal of such barriers, unless they had notice of such removal, and of the way having thereby been rendered unsafe (*Doherty v. Waltham*, 4 Gray, 596).

<sup>4</sup> *Erie City v. Schwingle*, 22 Penn. St. 384.

negligent acts of a third person in the highway, unless the highway is defective, or in some way obstructed or incumbered.<sup>1</sup> Thus, a town is not liable for injuries occasioned to a traveler on the highway by a locomotive engine, run by a railroad corporation on their track, illegally laid across the highway.<sup>2</sup>

§ 401. As a general principle, the fact that an injury to a traveler on a highway was caused by the combined effect of the unsafe condition of the road and the negligence of a third person, is no defense to the party who is bound to keep the highway in repair. Thus, although the driver of a stage-coach may have been somewhat negligent in not lighting his lamps, such neglect furnishes no excuse to a turnpike company, in an action by a passenger in the stage for injuries caused by a collision between the coach and the turnpike gate, which the company was bound to keep securely fastened back. If the injury was occasioned wholly by the driver's negligence, the company would not be liable; but if the injury was occasioned by the negligence of both, both in that case are liable to the injured party.<sup>3</sup> But it has been held in Massachusetts and Maine that the statutes of those states making towns liable for injuries resulting from defects in highways, do not embrace injuries which are the result of the joint negligence of a town and of a stranger.<sup>4</sup> In such a case,

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<sup>1</sup> Chamberlain v. Enfield, 43 N. H. 356.

<sup>2</sup> Vinal v. Dorchester, 7 Gray, 421. See *ante*, § 153.

<sup>3</sup> Danville &c. Turnp. Co. v. Stewart, 2 Metc. [Ky.] 119. In Talmadge v. Zanesville & M. Road Co. (11 Ohio, 197), it was held that a turnpike company was not liable for damages which stage-coach proprietors had been compelled to pay a passenger for injuries caused by a defect in the road, but a recovery might be had for injuries to the coach. The cases on this subject are fully collected under section 46, *ante*, which see.

<sup>4</sup> Shepherd v. Chelsea, 4 Allen, 113; Kidder v. Dunstable, 7 Gray, 104; Richards v. Enfield, 13 Gray, 344; Rowell v. Lowell, 7 Id. 100; Alger v. Lowell, 3 Allen, 402; Moulton v. Sanford, 51 Maine, 127; see Wellcome v. Leeds, 51 Maine, 313.

the third person in fault would, doubtless, be liable for the entire damages.<sup>1</sup> We greatly doubt, however, the correctness of the decisions relieving the towns from liability in such cases, and do not believe that they are or will be followed in other states.<sup>2</sup>

§ 402. As we have already seen, towns are not bound to fence their highways, merely to prevent travelers from straying out of the path, and are in no way responsible for the condition of the land outside the limits of the road. It follows that towns are not liable for injuries to a traveler on the road, caused jointly by a defect in the road and a defect in the adjoining premises, unless the defect in the road was the proximate cause of the injury.

§ 403. The town is liable for any injury of which a defect in the highway is the proximate cause. Thus, where a traveler, in the exercise of ordinary care and prudence, voluntarily leaped from his carriage, because of its near approach to a dangerous defect in the highway, and thereby sustained an injury, the town was held liable, although the carriage did not come in contact with the defect.<sup>3</sup> And so, where one who, in attempting to extricate his horse from a hole in a defective bridge, into which the horse had stepped, was injured by the animal, it was held, under the Vermont statute, that he could recover against the town which was bound to repair the bridge.<sup>4</sup> The town is not liable for injuries which are

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<sup>1</sup> See *Smith v. Smith*, 2 Pick. 621; *Powell v. Deveney*, 3 Cush. 300; *Mott v. Hudson River R. Co.*, 8 Bosw. 345.

<sup>2</sup> See *ante*, § 46, and notes; also *Hunt v. Pownal* (9 Verm. 411), in which it was held that the share of a stranger in producing the injury, if merely negligent, was not to be taken into consideration.

<sup>3</sup> *Lund v. Tyngsborough*, 11 Cush. 563.

<sup>4</sup> *Stickney v. Maidstone*, 30 Verm. 738; but compare *Hyde v. Jamaica*, 27 Verm. 443; *Bardwell v. Jamaica*, 15 Verm. 438.

only remotely caused by a defect in the road, even though they would not have happened had not such defects existed.<sup>1</sup>

§ 404. The obligation of a town to maintain a highway in repair ceases on the discontinuance of the road as a highway,<sup>2</sup> or on the supersedure of the road, and the assumption of the duty of its repair by another, under a lawful authority. Thus, when a highway is superseded by a plank-road, laid upon it by a private corporation, taking toll, the town in which it lies is not responsible for its defects.<sup>3</sup> But, in such a case, the substitution must be completed before the liability of the town ceases, and, in the meantime, the duty of maintaining the highway rests upon the town.<sup>4</sup>

§ 405. In Connecticut, it has been held that a turnpike company is liable for the non-repair of its road until

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<sup>1</sup> Where a horse, though driven with due care, became frightened and excited by reason of the striking of the vehicle to which it was attached against a defect in the highway, and, freeing himself from the control of his driver, ran away and knocked down a person on foot in the highway, the town was held not liable for the injury so occasioned, though no other cause intervened between the defect and the injury (*Marble v. Worcester*, 4 Gray, 395).

<sup>2</sup> *Tincker v. Russel*, 14 Pick. 279. And this, although the road, after its discontinuance, was repaired by the town surveyor (*Ib.*; and see *State v. Broyles*, 1 Bailey, 135). Notice of discontinuing a road need not be given to the towns, under the Vermont statute (*Ex parte Bostwick*, 1 Aik. 216). In New York, highways disused for six years cease to be highways (1 Rev. Stat. 520, § 99, as amended by Laws of 1861, ch. 311). A fence placed on a discontinued highway is not a nuisance (*Drake v. Rogers*, 3 Hill, 604).

<sup>3</sup> *Davis v. Lamoille Co. Plank-Road Co.*, 27 Verm. 602; but compare *Reed v. Cornwall*, 27 Conn. 48; and see *ante*, § 378.

<sup>4</sup> *Barber v. Essex*, 27 Verm. 62. The location of a railroad across a public highway, in pursuance of the power conferred by the charter of the railroad company, does not, while the railroad is in process of construction at that point, operate as a discontinuance of the highway, but only as a temporary suspension of its use (*Willard v. Newbury*, 22 Verm. 458). The town, in such case, during the temporary obstruction of the highway by the construction of the railroad, must provide a suitable by-way for the public, and use all proper and reasonable precautions to prevent travelers from passing upon the highway while it remains unsafe (*Ib.*)

the company is dissolved, or at least until the road has been abandoned so long as to furnish a presumption of its legal dissolution.<sup>1</sup> But, in general, we think a turnpike company is bound to keep its road in repair only so long as it retains its management, and keeps it open for travel.<sup>2</sup>

§ 406. But the acquisition by another of the right to use the road will not necessarily relieve the one originally liable for its non-repair from any further obligation. Thus, when the proprietors of a bridge allow it to be used by a railroad company, or the latter acquires the right to use it by legal proceedings, the proprietors of the bridge are still bound to guard against dangers which may arise from such new use.<sup>3</sup>

§ 407. Before a municipal corporation can be made liable for injuries caused by a defect in a highway, not arising from its construction, or by an obstruction placed therein by a wrong-doer, either express notice of the existence of the nuisance must be brought home to it, or the defect must be so notorious as to be observable by all,<sup>4</sup> in which

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<sup>1</sup> Reed v. Cornwall, 27 Conn. 48; see *ante*, § 378.

<sup>2</sup> See Ward v. Newark & P. Turnp. Co., 1 Spencer, 323. In New York, if a turnpike remains impassable, and the gates raised, for more than a year, the company is deemed to have suspended business for that period, within the meaning of the New York statute (1 Rev. Stat. 603), which makes a suspension of the ordinary business of a corporation for one year a ground of dissolution (People v. Hillsdale &c. Turnpike Co., 23 Wend. 254).

<sup>3</sup> Peoria Bridge Co. v. Loomis, 20 Ill. 285; see Amerman v. Wyoming &c. Canal Co., 40 Penn. St. 256; Commonwealth v. Worcester Turnpike Co., 3 Pick. 327. In the last case, a turnpike was laid out over an old county or town road; and it was held that the company receiving toll for the road so laid out was bound to keep it in repair, and could not object that it was not accepted as a turnpike, or that it was not of the width required by law. So far as it regards the public, an agreement by the town in which the road lies to keep it in repair will not release the turnpike company from its obligation. In Roxbury v. Worcester Turnp. Co. (2 Pick. 41), it was held that a town, having kept in repair a part of a turnpike road laid out over an ancient county or town road, cannot maintain an action of *assumpsit* against the turnpike corporation to recover the expenses incurred.

<sup>4</sup> Mayor &c. of New York v. Sheffield, 4 Wallace, 189; Griffin v. Mayor &c. of

case the corporation is charged with constructive notice, being in fault for not knowing the fact.<sup>1</sup>

§ 408. The same rule prevails as to towns in the New England states, except Maine and Massachusetts. Actual notice of a defect in a highway is not necessary. It is enough that the defect was of such a character and long continuance that the town was reasonably bound, under the circumstances, to have remedied it.<sup>2</sup> In Massachusetts, however, the town must have reasonable notice of the defect, or it must have existed at least twenty-four hours previous to the occurrence of the injury.<sup>3</sup> A similar stat-

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New York, 9 N. Y. 456; *Vandyke v. Cincinnati*, 1 Disney, 532. In an action against a municipal corporation to recover damages sustained in consequence of grating over an area in the sidewalk being in a defective or unsafe condition, it is not enough to prove that the cover was insecurely fastened, and that by reason thereof, and without fault on his part, the plaintiff was injured. Notice to the defendant of the defect, or negligence of duty in not ascertaining and remedying it, must be shown (*McGinity v. Mayor &c. of N. Y.*, 5 Duer, 674; *Reinhard v. Mayor &c. of New York*, 2 Daly, 243; see *Hart v. Brooklyn*, 36 Barb. 226; *Dewey v. Detroit*, 15 Mich. 307; *Montgomery v. Gilmer*, 33 Ala. [N. S.] 116). Proof that a coach driven upon one of the piers owned by the city corporation broke through a plank that was decayed, by means of which plaintiff's trunk was thrown into the river, and the contents damaged, is not sufficient to sustain an action against the city for the injury, nor to put the defendants to proof of reasonable and proper care and diligence in keeping such pier in repair. In order to establish even a *prima facie* right of action, the plaintiff must show affirmatively on his part not only that the plank was decayed, but that the proper officers of the corporation had notice of the defect, or that it was obvious to the eye without any particular examination (*Garrison v. Mayor &c. of N. Y.*, 5 Bosw. 497).

<sup>1</sup> "If one would be liable for injury occasioned by a cause of mischief of whose existence he has knowledge, he will be equally liable if he is negligently ignorant of its existence" (*Mersey Docks Trustees v. Gibbs*, Law Rep. 1 H. L. 93; see *ante*, § 148).

<sup>2</sup> *Howe v. Plainfield*, 41 N. H. 135; *Bardwell v. Jamaica*, 15 Verm. 438; *Prindle v. Fletcher*, 39 Id. 255; *Lobdell v. New Bedford*, 1 Mass. 153; *Reed v. Northfield*, 13 Pick. 94; *Bigelow v. Weston*, 3 Id. 267; *Manchester v. Hartford*, 30 Conn. 118. But see *Morrill v. Deering*, 3 N. H. 53.

<sup>3</sup> Mass. Gen. Stat. 1860, p. 247, ch. 44, § 22. If an injury is caused by reason of the elevation of one edge of a plank, which is laid over an open space left for the passage of water in a public street, and this is found to be an actionable defect, it is enough to authorize a verdict for the plaintiff if the plank has been split, loose, liable to change, and unsafe for twenty-four hours before the accident; or if the city authorities had reasonable notice of its unsafe condition; although the position of the plank, which was the immediate cause of the accident, had only continued for a short time



ute exists in Maine, and in that state the question, what is "a reasonable notice," has been held to be one of law rather than of fact.<sup>1</sup> Notice need not be given to the town in its corporate capacity, nor to its officers. If given to two of the inhabitants of a town, capable of communicating the information, though such persons are not among the principal men of the town, and are not assessed for public taxes, it is held to be sufficient.<sup>2</sup>

§ 409. It will have been observed that the obligation of towns in the New England states is, by the terms of the statutes imposing it, limited to the making of their highways safe and convenient for *travelers*, their horses, &c. Therefore, towns are not liable to the owner of adjoining land, as such, for injuries caused by a defect in a highway; their only duty being to those who have occasion to travel on the highway.<sup>3</sup> A very strict construction has been

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(Winn v. Lowell, 1 Allen, 177). And in Vermont, towns are not liable for injury caused by snow or ice obstructing highway, unless notice in writing is given to surveyor of highways for at least twenty-four hours before injury was caused. See Clark v. Corwith (41 Verm. 449), as to what notice of defects caused by a sudden freshet is necessary.

<sup>1</sup> Spingler v. Bowdoinham, 7 Maine, 442; Bragg v. Bangor, 51 Id. 531; French v. Brunswick, 28 Maine, 29. There Whitman, C. J., said: "To decide what shall constitute reasonable notice is, in many cases, attended with difficulty. The words "reasonable notice" are undefined in the statute. Every case will present its peculiar circumstances, so that a decision in one will seldom furnish a precedent for another. It is not considered necessary to prove notice to the town in its corporate capacity, as the language of the statute, taken literally, would seem to import; nor is it necessary that the majority of the inhabitants should have had notice; nor is it even necessary to bring home the knowledge to any officer of the town. It has sometimes been considered, if it be proved that some principal inhabitant had notice, it would be sufficient."

<sup>2</sup> Mason v. Ellsworth, 32 Maine, 271; Lobdell v. New Bedford, 1 Mass. 153. If individual inhabitants of a town have knowledge of a defect in a road, this is sufficient notice to the town in its corporate capacity (Tuell v. Paris, 30 Maine, 556).

<sup>3</sup> Ball v. Winchester, 32 N. H. 435; see Stinson v. Gardiner, 42 Maine, 248; Brooks v. Boston, 19 Pick. 174; and see Willard v. Cambridge, 3 Allen, 574; Peck v. Ellsworth, 36 Maine, 393; Conway v. Jefferson, 46 N. H. 521. In Smith v. Dedham (8 Cush. 522), Dewey, J., said: "This is an action wholly on the statute creating a liability on the part of the town for an injury to the person or property by reason of any defect or want of repair in the highway. It is a limited one, and not to be extended beyond the special purpose of protecting travelers from injuries while

placed upon the words of the statutes in Massachusetts and Maine. In those states, it has been held that one complaining of an injury from a defective highway must have been in the present act of traveling along the highway at the time of the accident, and therefore, that a child playing upon the street,<sup>1</sup> or a person stopping by the wayside to converse,<sup>2</sup> is not in such a use of the highway as entitles him to complain of its defects.<sup>3</sup> And so a town is not liable for injuries received by a horse which has escaped from adjacent land,<sup>4</sup> or from his driver,<sup>5</sup> and runs at large upon the highway. Highways, however, may be used for other purposes than the accommodation of public travel, if such purposes are not inconsistent with the reasonably free passage of the public over them. Therefore, it is not a nuisance to use a highway for the purpose of moving a building from one place to another, proper expedition and caution being used.<sup>6</sup> And so it is not an unrea-

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traveling on such highway, leaving the public prosecution by individuals as the remedy for neglect to keep these roads in a proper state for traveling, or permitting them to be so encumbered by reason of some nuisance that no traveler could attempt to use them while in the exercise of ordinary care and prudence."

<sup>1</sup> *Stinson v. Gardiner*, 32 Maine, 248.

<sup>2</sup> *Blodgett v. Boston*, 8 Allen, 237.

<sup>3</sup> *Stickney v. Salem*, 3 Allen, 374.

<sup>4</sup> *Richards v. Enfield*, 13 Gray, 344. In that case, Bigelow, J., said: "The duty imposed on towns in respect to the repair of highways is, that they should keep them safe and convenient for travelers, with their horses, teams, and carriages. The liability of towns for defects or want of repair in highways is intended to be commensurate with this duty. It is only those who are using the road for legitimate purposes in the usual and ordinary mode that can claim indemnity of a town for injuries caused solely by defects in the highway, or by the combined effect of such defects and pure accident. Beyond this, the legal liability of towns does not extend. In the present case, the plaintiff was not traveling on the road at the time of the accident. He had driven his horse out of the highway, and there tied him. His use of the road for the time being had ceased as entirely as if he had taken his horse out of the vehicle and placed him in a stable, or turned him into a pasture. As it is clear that towns cannot be held responsible for damages happening to animals unlawfully at large, or who escape into highways without drivers, through carelessness or accident, it follows that, on the facts proved in this case, the plaintiff cannot maintain his action."

<sup>5</sup> *Davis v. Dudley*, 4 Allen, 557; but see *Verrill v. Minot*, 31 Maine, 299.

<sup>6</sup> *Graves v. Shattuck*, 35 N. H. 257.

sonable use of a highway to drive an elephant over it, with due care, and if the animal is injured from a defect in the highway, the town is liable therefor.<sup>1</sup>

§ 410. He, and he only, can maintain an action for a defect in a highway, who has sustained some damage peculiar to himself, his trade, or calling.<sup>2</sup> A private action will not lie for an injury caused by the non-repair of a highway, if all other persons passing suffer in the same kind, even though in far less degree.<sup>3</sup> The plaintiff must show that he has suffered damage beyond, and in excess of, what other people have suffered.<sup>4</sup> Thus, the

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<sup>1</sup> Gregory v. Adams, 14 Gray, 242. It is a question for the jury whether, from the time, place, and other circumstances, it was reasonably proper to take such an animal over a highway kept for reasonable use of the public (Ib; and see Graves v. Shattuck, 35 N. H. 257).

<sup>2</sup> Iveson v. Moore, 1 Ld. Raym. 486; 1 Salk. 15; Hubert v. Groves, 1 Esp. 148; Rose v. Groves, 5 Man. & G. 613, and cases *infra*. It is well understood, however, that where an injury, although not joint, is yet common to several persons residing in the neighborhood, as the building of a slaughter-house in a city, they may properly unite as plaintiffs in a bill to restrain it (Brady v. Weeks, 3 Barb. 157; Murray v. Hay, 1 Barb. Ch. 59). When, by reason of the blasting of rocks, all persons in the neighborhood of plaintiff's premises "were kept in continual fear and jeopardy of their lives, rendering a proper attention to business full of fear and danger, &c.," it was held to constitute a nuisance, and that an action on the case would lie (Scott v. Bay, 3 Md. 431; see Lansing v. Smith, 4 Wend. 25; First Baptist Ch. v. Schenectady & Troy R. Co., 5 Barb. 79; Fish v. Dodge, 4 Den. 311).

<sup>3</sup> Willard v. Cambridge, 3 Allen, 574; see Hartshorn v. South Reading, 3 Allen, 504; Harvard College v. Stearns, 15 Gray, 1; Brightman v. Fairhaven, 7 Gray, 271; Blood v. Nashua &c. R. Co., 2 Gray, 140; Brainard v. Conn. River R. Co., 7 Cush. 511; Quincy Canal Co. v. Newcomb, 7 Metc. 276.

<sup>4</sup> Winterbottom v. Lord Derby, Law Rep. 2 Exch. 316, 323; see Rickett v. Metropolitan R. Co., 5 Best & S. 156. An individual cannot maintain an action against the proprietors of a canal for damages caused by their omission to construct the canal according to the requisitions of their charter, or their omission to keep the canal in repair, if his damage be such only as he suffers in common with all others (Quincy Canal v. Newcomb, 7 Metc. 276). In that case the court said: "When one suffers in common with all the public, although from his proximity to the obstructed way, or otherwise from his more frequent occasion to use it, he may suffer in a greater degree than others, still he cannot have an action, because it would cause such multiplicity of suits as to be itself an intolerable evil. But when he sustains a special damage, differing in kind from that which is common to others, as where he falls into a ditch unlawfully made in a highway, and hurts his horse, or sustains a personal damage, then he may bring his action." To the same effect

mere fact that one is delayed by an obstruction, and is obliged, in common with every one else who attempts to use the highway, either to pursue his journey by a less direct road, or else to remove the obstruction, will not entitle him to maintain an action for damages.<sup>1</sup> And although an obstruction in a highway may make it difficult, or indeed impossible, for a merchant to deliver goods at his store, or for a farmer to gather his crops, or for a landlord to rent his houses, yet if the whole neighborhood suffer damages from the same cause, similar in kind, even if less in degree, no damages are recoverable.<sup>2</sup> Upon this principle, no one can recover damages for being deprived, with the rest of the community, of the use of a highway by its *total* obstruction, as, for example, by a great fall of snow.<sup>3</sup>

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are *Moore v. Wabash & Erie Canal* (7 Ind. 462), and *Blanc v. Klumpke* (29 Cal. 156).

<sup>1</sup> *Winterbottom v. Lord Derby*, Law Rep. 2 Exch. 316). In that case, the plaintiff was in the habit of using a footway across the defendant's property, either for the purpose of taking a walk, or of visiting friends, or otherwise for pleasure or profit. Held, that he could not recover damages for his being delayed by an obstruction in the footway while removing the obstruction. "A mere passer-by cannot do so, nor can a person who thinks fit to go and remove the obstruction" (*Ib.*, per Kelly, C. B.) In *Rose v. Miles* (4 Maule & S. 102), Lord Ellenborough, C. J., said that the damage must be "something substantially more injurious" to the individual than to other people.

<sup>2</sup> Thus, while a pile of wood lay on the street, constituting the bulkhead in front of the plaintiff's storehouse, it was held that an injury thereby to the rental of plaintiff's store was common to all other property in the neighborhood, and was not a ground of private action by an individual (*Dougherty v. Bunting*, 1 Sandf. 1; *Willard v. Cambridge*, 3 Allen, 574). Though a bridge over a navigable stream may be a nuisance to those navigating it, it does not follow that it is a nuisance as to others who do not navigate it (*Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44). The construction of a basin and erections in a river, whereby the plaintiff's docks were rendered inaccessible, or less easy of approach, does not authorize an action (*Lansing v. Smith*, 8 Cow. 146; *Butler v. Kent*, 19 Johns. 223; compare *Mills v. Hall*, 9 Wend. 315; *Pierce v. Dart*, 7 Cow. 609).

<sup>3</sup> An action cannot be maintained against a town for damages alleged to have been caused to the plaintiff by the obstruction of a road by snow, "by reason whereof he was prevented from traveling on the road with his cattle and teams, and on foot, and from transporting his logs and timber to a saw-mill, from otherwise working on his wood-lot, and about his logs and wood." And a declaration setting forth

§ 411. Where, however, a person has suffered damages which are special and peculiar to himself, such as an expense of time, money, or labor, however inconsiderable in value, he has his remedy by action. As to what damages will be considered so special as to entitle one to recover them, the decisions are not altogether uniform. Thus, in an early English case,<sup>1</sup> it was held, that the being put to the necessity of taking a more circuitous route was not a special damage, and this ruling was adopted in Kentucky.<sup>2</sup> But it is now well settled<sup>3</sup> that, whether the delay be caused by the time consumed, either in going a longer way, or in removing the obstruction,<sup>4</sup> the action will lie. Where, by the blocking up of a street for an unreasonable time, customers are diverted from the plaintiff's shop, his loss of business is such a special damage as will entitle him to a recovery.<sup>5</sup>

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such a cause of action is bad on demurrer (*Holman v. Townsend*, 13 Metc. 297; see *Brailey v. Southborough*, 6 Cush. 141; *Griffen v. Sanbornton*, 44 N. H. 246; *Tisdale v. Norton*, 8 Id. 388; *Adams v. Carlisle*, 21 Pick. 146; *Stetson v. Faxon*, 19 Id. 147).

<sup>1</sup> *Hubert v. Groves*, 1 Esp. 148. And in *Paine v. Partrich* (Carth. 194), there is a dictum that delay of a journey, by which one is damnified and an important affair neglected, is insufficient.

<sup>2</sup> *Barr v. Stevens*, 1 Bibb, 293.

<sup>3</sup> *Rose v. Miles*, 4 Maule & S. 101; *Winterbottom v. Lord Derby*, Law Rep. 2 Exch. 316; *Pierce v. Dart*, 7 Cow. 609; and see *Hughes v. Heiser* (1 Binn. 463), as to the rule in Pennsylvania.

<sup>4</sup> *Greasley v. Codling*, 2 Bing. 263; *Wiggins v. Boddington*, 3 Carr. & P. 544. But compare *Winterbottom v. Lord Derby*, Law Rep. 2 Exch. 316. In *Hart v. Bassett* (Sir T. Jones, 156; 4 Vin. Abr. 519), the plaintiff, who was a farmer of tithes, was prevented by the defendant's obstruction from carrying them home. He had to take tithe, and he was liable to an action if he allowed the tithe to be injured on the ground, or if it was not taken within a reasonable time. He was, in consequence of the obstruction, obliged to spend extra money in the discharge of his calling. It was held, that he might maintain his action for damages. In *Iveson v. Moore*, (1 Ld. Raym. 486), the plaintiff was the possessor of a colliery, and was obliged in order to obtain the profits of his trade, to take laden carts and wagons almost every day along a certain highway. By an obstruction in the highway, his wagons were delayed, and he personally sustained pecuniary damages. Held, that he could recover.

<sup>5</sup> *Wilkes v. Hungerford Market Co.*, 2 Scott, 446; 2 Bing. N. C. 281; 1 Hodges,

§ 412. It is hardly necessary to remark that one whose own negligence contributed, in conjunction with a defect in a highway, to produce an injury, cannot recover any damages he may have sustained therefrom. In general, the standard of care required of travelers upon a highway is simply such as persons of common prudence ordinarily exercise,<sup>1</sup> and it is generally, though not uniformly, held, that the plaintiff is bound to prove such care on his part.<sup>2</sup> In Massachusetts, it has been held that one who was traveling, in violation of law, on Sunday, when he was injured by a defect in a highway, cannot recover;<sup>3</sup> but the contrary decision has been made in New Hampshire.<sup>4</sup>

§ 413. Greater care is perhaps required of a person of poor or defective sight than is required of persons of

281. *Maynell v. Saltmarsh* (1 Keb. 847) was an action for erecting posts in a highway which was the nearest way for the plaintiff to his close. By reason of the stopping of the way, the plaintiff's corn was corrupted and spoilt, he being unable to carry it away. Held, to be a sufficient special damage.

<sup>1</sup> *Farrar v. Greene*, 32 Maine, 574; *Merrill v. Hampden*, 26 Id. 234; *St. Paul v. Kirby*, 8 Minn. 154; *Kelsey v. Glover*, 15 Verm. 711; *Moore v. Abbot*, 32 Maine, 46; *Fallon v. Boston*, 3 Allen, 38; *Baltimore v. Brennan*, 14 Md. 227. A surveyor of highways cannot recover damages of the town for any injury he may receive through any defect of the highways within his district where such injury has arisen from his own default (*Wood v. Waterville*, 4 Mass. 422; 5 Id. 294).

<sup>2</sup> *Bigelow v. Rutland*, 4 Cush. 247; *Rusch v. Davenport*, 6 Iowa, 443; *Manderschid v. Dubuque*, 25 Id. 108; *Merrill v. Hampden*, 26 Maine, 234; *Gleason v. Bremen*, 50 Id. 222; *Lane v. Crombie*, 12 Pick. 177; *Hull v. Richmond*, 2 Woodb. & M. 337; *Baltimore v. Marriott*, 9 Md. 160; *Raymond v. Lowell*, 6 Cush. 524; and see cases cited under §§ 43, 44, *ante*. In Wisconsin it is now settled that the plaintiff is not bound, in the first instance, to show that he was not guilty of negligence which contributed to the injury; but it is enough if the proof introduced and the circumstances attending the injury establish *prima facie* that the injury was occasioned by the negligence of the defendant (*Milwaukie & Chicago R. Co. v. Hunter*, 11 Wisc. 160; *Achtenhagen v. Watertown*, 18 Id. 331). And in Vermont it is held, that the plaintiff need not, in an action against a town for injuries caused by a defect in a highway, establish as a distinctive point in the outset that he was not guilty of negligence in his own conduct (*Hill v. New Haven*, 37 Verm. 501).

<sup>3</sup> *Jones v. Andover*, 10 Allen, 18.

<sup>4</sup> *Dutton v. Ware*, 17 N. H. 34; and see *Sherman v. Kortright*, 52 Barb. 267; *Nodine v. Doherty*, 46 Id. 59.

good sight in traveling upon a highway.<sup>1</sup> But no one, whatever his infirmities, is bound to use extraordinary care. The test of extraordinary care would throw the whole responsibility upon one side, and thus the party creating the cause of the mischief would escape all liability. Such a rule is manifestly unjust. A traveler, howsoever blind or halt, has a right to presume, and to act upon the presumption, that a highway in constant use is reasonably safe for ordinary travel;<sup>2</sup> and he is not in fault in neglecting to observe and avoid a defect therein which is not so plain and obvious as to be necessarily observable by one in the possession of ordinary faculties, traveling at an ordinary pace.<sup>3</sup> He is not bound to have the most perfect vision, nor to look far ahead to avoid defects which ought not to exist.<sup>4</sup> He need have only a reasonable assurance of safety before venturing upon the highway,<sup>5</sup> and whether such assurance, under the circum-

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<sup>1</sup> *Winn v. Lowell*, 1 Allen, 177.

<sup>2</sup> *Davenport v. Ruckman*, 10 Bosw. 20, 34; affirmed, 37 N. Y. 568.

<sup>3</sup> *Cox v. Westchester Turnp. Co.*, 33 Barb. 413; *Frost v. Waltham*, 12 Allen, 85.

<sup>4</sup> *Thompson v. Bridgewater*, 7 Pick. 188. "It is not true that a traveler on a public thoroughfare is guilty of culpable negligence, as matter of law, if he does not stop to listen or look up and down the track, before he goes over a railroad crossing. Whether such an omission is culpable depends upon the facts and circumstances of each particular case" (per Porter, J., *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 36. And see *Newson v. N. Y. Central R. Co.*, 29 N. Y. 390; *Johnson v. Hudson River R. Co.*, 20 Id. 74; *Hegan v. Eighth Avenue R. Co.*, 15 Id. 383; *Gordon v. Grand Street R. Co.*, 40 Barb. 550; *Pennsylvania R. Co. v. Ogier*, 35 Penn. St. 60).

<sup>5</sup> *Renwick v. N. Y. Central R. Co.*, 36 N. Y. 133; *Davenport v. Ruckman*, 37 N. Y. 568; affirming *S. C.*, 10 Bosw. 20. In the latter case, the plaintiff, who was partially blind, was, while walking along a public street, precipitated into an excavation and injured. On the question of the plaintiff's contributory neglect, she being partially blind, the court submitted it to the jury, "whether it was so improper for her to have gone into the street unattended, in her then condition of sight, that it would be negligence on her part to do so, sufficient to prevent her from receiving compensation for an injury she might sustain from the negligence of others, while passing along the street." The charge was sustained. Hunt, C. J., said, "The streets and sidewalks are for all conditions of people, and all have the right, in using them, to assume that they are in good condition, and to regulate their conduct upon that assumption. A person may walk or drive in the darkness of the night, relying upon the belief that the corporation has performed its duty, and that the street or the

stances, was well founded is a question for the jury to determine.

§ 414. The mere fact that a traveler is familiar with the road, and knows of the existence of a defect therein, will not impose upon him the duty to use more than ordinary care in avoiding it.<sup>1</sup> Such knowledge is a circumstance, and, perhaps, a strong circumstance, but it should be submitted, with the other facts of the case, to the jury, for them to determine whether, with such knowledge, the plaintiff exercised ordinary care in proceeding on a way known to be dangerous, or, in proceeding, used ordinary care to avoid injury.<sup>2</sup> If the defect was of

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walk is in a safe condition. He walks by a faith justified by law, and if his faith is unfounded, and he suffers an injury, the party in fault must respond in damages. So, one whose sight is dimmed by age, or a near-sighted person whose range of vision was always imperfect, or one whose sight has been injured by disease, is each entitled to the same rights, and may act upon the same assumption. Each is, however, bound to know that prudence and care are in turn required of him, and that, if he fails in this respect, any injury he may suffer is without redress. The blind have means of protection and sources of knowledge of which all are not aware. The plaintiff could see persons, and could distinguish outlines. If a post had obstructed her path, the jury might well have said, upon this evidence, that she would have seen and avoided it. Whether a hole in the ground could be distinguished by her and avoided was for the jury to say; and whether her power of sight was sufficient to justify her in walking the streets alone was eminently a question for them. A 'reasonable assurance of safety' in passing through the streets when in good condition, as submitted by the judge, was a fair test of capacity."

<sup>1</sup> Reed v. Northfield, 13 Pick. 94; Smith v. Lowell, 6 Allen, 39; Snow v. Housatonic R. Co., 8 Allen, 441, 450; Frost v. Waltham, 12 Id. 85; Clark v. Lockport, 49 Barb. 580. A large pile of dirt, covering a portion of the highway, had existed for more than two years, and lay within sixty rods of the dwelling of the plaintiff, who had known its existence ever since its creation, and had passed it the day before. Full instructions having been given to the jury as to the care required of the plaintiff under the circumstances, a verdict in favor of plaintiff was not disturbed (Whittaker v. West Boyleston, 97 Mass. 273). The plaintiff saw, during the day time, a wagon obstructing the road. The same night he drove against it. Held, that he was not in fault, as he had a right to presume that it would be removed before night (Fox v. Sackett, 10 Allen, 535). The plaintiff was injured by the fall of a bridge over which he was passing, and which he knew to be defective, but which was left open for public use. Held, that he could recover (Humphreys v. Armstrong Co., 56 Penn. St. 204).

<sup>2</sup> In general, such knowledge will raise such a presumption of negligence on the plaintiff's part as to require proof to negative the presumption (Achtenhagen v. Water-



such a character that men of ordinary prudence, having knowledge of it, would not, under ordinary circumstances, have attempted to pass at their own risk, a traveler has no right to try the experiment at the risk of the public.<sup>1</sup> This rule should especially hold in a case where, by taking another side of the road, the defect might have been easily avoided;<sup>2</sup> but the mere fact that the obstructed street was out of the way of the point at which a traveler was aiming, or that he might have taken a nearer

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town, 18 Wisc. 331; *Folson v. Underhill*, 36 Verm. 580; *Fox v. Glastenbury*, 29 Conn. 204; *Wilson v. Charlestown*, 8 Allen, 137; see *Jacobs v. Bangor*, 16 Maine, 187; *Cornelius v. Appleton*, 22 Wisc. 635). The jury were instructed that if the plaintiff knew of the deep cut in the street, he must use *extraordinary* care in passing in the night. Held, that this was erroneous, and that the instructions should have been that the plaintiff must use ordinary care, but that they must consider, in deciding what was ordinary care, all the circumstances of the case, the plaintiff's knowledge of the obstruction, and the possibility of taking another convenient road (*Hanlon v. Keokuk*, 7 Iowa, 488, overruling *Mt. Vernon v. Dusouchett*, 2 Ind. 586; and see *Brown v. Jefferson*, 16 Iowa, 339). In *Smith v. Lowell* (6 Allen, 39), the court refused to charge that, if the plaintiff was familiar with the place where the accident occurred, it was his duty to use more care than if he was wholly ignorant of its condition, or to avoid the place altogether; but instructed the jury that the burden of proof was on the plaintiff, to show that he had used reasonable care, adapted to the circumstances of the case, and that, if he was familiar with the place, they should take that fact into consideration, and determine whether, on account of it, he ought to have used increased care in passing over it, or to have avoided it altogether. The refusal and charge were sustained.

<sup>1</sup> *Hubbard v. Concord*, 35 N. H. 52.

<sup>2</sup> *Carolus v. Mayor &c. of N. Y.*, 6 Bosw. 15; *James v. San Francisco*, 6 Cal. 528; *Hubbard v. Concord*, 35 N. H. 52. One who voluntarily attempts to pass over a sidewalk known to be dangerous by reason of ice upon it, which might easily be avoided, or who enters upon a road known to be obstructed with snow, is guilty of negligence (*Wilson v. Charleston*, 8 Allen, 137; *Horton v. Ipswich*, 12 Cush. 488). And where one complains of an injury from the formation of a gutter in a city, evidence that a great many similar gutters were in the city is competent to raise a presumption in the minds of the jury that the plaintiff did not cross with care (*Packard v. New Bedford*, 9 Allen, 200). Where a person who had occasion to cross in the day time from one side of the street to the other, selected for that purpose a portion of the street which, having been necessarily and properly appropriated for a drain, was covered by an iron grating, and in attempting to cross over the grating fell and was injured, there being no reason for attempting to cross at that place rather than at any other part of the street, it was held that the passenger attempting to cross at that particular spot was not in the exercise of ordinary care, and could not, therefore, recover damages of the city for the injury so suffered (*Raymond v. Lowell*, 6 Cush. 524. Compare, however, *Sessions v. Newport*, 23 Verm. 9).

way is immaterial, as it is the duty of the public to repair *all* the streets.<sup>1</sup>

§ 415. On the other hand, it is not, as matter of law, negligence for one to travel over a road with which he is wholly unacquainted, even in a dark night, without a light or guard. And where such an one, in passing along a highway unknown to him, walked off, in the night time, an unfenced embankment by the side of the road, the town was held liable for his injuries.<sup>2</sup>

§ 416. If the injury is occasioned jointly by a defect in the highway and a defect in the plaintiff's horse, carriage, or harness, rendering it unsafe or unsuitable, and which the plaintiff is in fault for not repairing, he cannot recover.<sup>3</sup> In Maine it has been held that this rule should be

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<sup>1</sup> So where a canal company permitted, for hire and reward, bargemen to moor their barges at certain mooring places on the canal, it is bound to keep the whole of the premises, and all the ways to the canal over which the bargemen passed to and from their boats, in good repair. It is immaterial whether the way which was obstructed was or was not the nearest way (*Shebottom v. Egerton*, 18 Law Times [N. S.] 364; and see *Erie City v. Schwingle*, 22 Penn. St. 384).

<sup>2</sup> *Williams v. Clinton*, 28 Conn. 264. Driving in a violent storm through the streets of a city with which the driver is unacquainted, is not, of itself, negligence which will prevent his recovery of damage for injuries received through defects in the street (*Milwaukee v. Davis*, 6 Wisc. 377).

<sup>3</sup> A loaded wagon being strained and injured by a defect in the highway, the driver stopped, examined it, and proceeded on his journey. After passing over a rough and muddy road, and while on a smooth and level road, the axletree broke, and he was thrown from the wagon and injured. Held, that the breaking of the axletree had been caused partly by the driver proceeding on his journey after the first injury to it, and there was no sufficient evidence to be submitted to the jury in support of an action by the driver against the town, for the personal injury to him (*Jenks v. Wilbraham*, 11 Gray, 142). The plaintiff's negligence, however, is always a question for the jury. Thus, where an accident was caused in descending a steep hill, partly by the slipping of one of the plaintiff's horses, and partly by the insufficiency of the road, and it appeared that the horse's shoes were smooth behind, so as to render it difficult for him to hold back the load, and the wheels were not chained or confined, it was held to be a fact for the jury to find whether, under all the circumstances of the case, the plaintiff was wanting in ordinary care and prudence in placing himself in that situation, so as to have those circumstances conspire with the situation of the road in producing the injury (*Allen v. Hancock*, 16 Verm. 230; see *Noyes v. Morristown*, 1 Id. 357; *Bigelow v. Rutland*, 4 Cush. 247).

applied, notwithstanding the plaintiff had no knowledge of the defects in his carriage or harness, and was in no fault for not knowing it.<sup>1</sup> But in New Hampshire, Vermont and Massachusetts, it is held that a traveler is not precluded from recovery by the fact that a defect in his carriage contributed to the injury, provided the defect was unknown to him, and he was not negligent in not knowing it.<sup>2</sup> This is the more reasonable doctrine; and we are confident that it will generally prevail. If the viciousness of the plaintiff's horse, or its inability to bear the risks of ordinary public travel, contributed to produce the injury, the plaintiff cannot recover.<sup>3</sup> Where a traveler's horse became unmanageable by reason of being taken sick, and,

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<sup>1</sup> Moore v. Abbott, 33 Maine, 46; Coombs v. Topshaw, 38 Id. 204; Farrar v. Greene, 32 Id. 574.

<sup>2</sup> Clark v. Barrington, 41 N. H. 44; Tucker v. Hennicker, Id. 317; Winship v. Enfield, 42 Id. 197; Palmer v. Andover, 2 Cush. 600. And see Rowell v. Lowell, 7 Gray, 100; Titus v. Northbridge, 97 Mass. 265. In Hunt v. Pownal (9 Verm. 411), it appeared that the plaintiff's wagon had a defective nut, which gave way, and, the road being separated from a river only by a rotten rail, the wagon fell into the river. Held, that the plaintiff could recover. And Redfield, J., said; "In every case of damage occurring on the highway, we could suppose a state of circumstances in which the injury would not have occurred. If the team had not been too young or restive, or too old, or too headstrong, or the harness had not been defective, or the carriage insufficient, no loss would have intervened. It is against these, constantly occurring accidents that towns are required to guard in building highways. The traveler is not bound to see to it that his carriage and harness are always perfect, and his team of the most manageable character and in the most perfect training, before he ventures upon the highway. If he could be always sure of all this, he would not require any further guaranty of his safety, unless the roads were absolutely impassable. If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the insufficiency of the road, conspiring with some accidental cause, the defendants are liable."

<sup>3</sup> Bliss v. Wilbraham, 8 Allen, 564; and see Illinois Central R. Co. v. Buckner, 28 Ill. 299. Thus, where the judge instructed the jury that if the plaintiff, while driving with ordinary care such a horse as a man might reasonably drive on an ordinarily safe highway, suffered injury on account of a defect in the highway, and would not have suffered injury but for such defect, he was entitled to recover, "although, the action of the horse, from some vicious habit occasionally operating, might have contributed to the result," it was held that the last clause of this instruction was erroneous (Murdock v. Warwick, 4 Gray, 178). Evidence of the previous bad behavior of the horse is admissible, to show negligence on plaintiff's part (Dennett v. Wellington, 15 Maine, 27).

ceasing to obey the rein, bore to one side of the road, in spite of the efforts of the driver to stop him, and after continuing on in that way for several rods pitched over an unfenced embankment on the side of the road, the town was held not liable, because, for all that appeared, the accident would not have occurred if the horse had been controllable.<sup>1</sup>

·§ 417. Any unskillfulness on the part of the driver in the management of his horse,<sup>2</sup> or the violent driving thereof,<sup>3</sup> will preclude him from a recovery, if it contributed to the injury. Where a driver's reins become accidentally crossed, and the horse is guided out of the way, the court will not say, however, as matter of law, that the

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<sup>1</sup> *Titus v. Northbridge*, 97 Mass. 258; *Horton v. Taunton*, Id. 266, note. But a horse is not to be considered uncontrollable that merely shies or starts, or is momentarily not controlled by the driver (Ib.)

<sup>2</sup> *Peoria Bridge Asso. v. Loomis*, 20 Ill. 235. In *Cassidy v. Stockbridge* (21 Verm. 391) it was held that if the driver was so intoxicated as to be incapable of managing himself and his team with ordinary care and prudence, he could not be said to be in the use of ordinary care, and if this want of ordinary care contributed in the slightest degree to produce the injury, the plaintiff could not recover. The mere fact of intoxication, however, will not establish want of ordinary care on the part of a traveler. The jury must determine whether his intoxication contributed to his injury. If it did not, it is of no importance (*Alger v. Lowell*, 3 Allen, 402; *Stuart v. Machias Port*, 48 Maine, 477). Permitting a woman to drive a horse is not conclusive evidence of want of ordinary care (*Cobb v. Standish*, 14 Maine, 198). The defendant placed lime rubbish in a highway; the dust blown from it frightened the plaintiff's horse and nearly carried him into contact with a passing wagon, in avoiding which he unskillfully drove over other rubbish placed in the road by another person, and was overthrown and hurt. Held, that the plaintiff could not recover, the proximate cause of the damage being his own unskillfulness (*Flower v. Adams*, 2 Taunt. 314).

<sup>3</sup> *Butterfield v. Forrester*, 11 East, 60. But the court cannot say, as matter of law, that a competent driver is in fault for driving ten miles an hour, at night, over a road which was clear when he went over it an hour previously (*Reed v. Deerfield*, 8 Allen, 522). The plaintiff received an injury by the springing of a bridge occasioned by driving at a trot, when by statute he had no right to drive faster than a walk. The bridge was good and sufficient except in the matter of its springing when driven upon at a trot. Held, that the town was under no legal obligation to provide a bridge sufficient for such use (*Abbott v. Walcott*, 38 Verm. 666). In *Heland v. Lowell* (3 Allen, 407), it was held that one who was driving faster than a by-law allowed, could not recover for an injury caused by a defect in the road, although it did not appear that his fast driving contributed to his injury.

driver's negligence contributed to the injury.<sup>1</sup> In driving a horse not entirely gentle and manageable, it is said that more than ordinary caution is required of the driver in passing an object calculated to frighten horses.<sup>2</sup> In hitching a horse in the street ordinary care is required, and if, notwithstanding such care, the horse gets loose, and while straying on the highway is injured by a defect therein, the owner may recover his damages.<sup>3</sup>

§ 418. Where the statute prescribes a wagon-load shall not exceed a certain weight, if the load exceeds that weight, however insufficient the highway may be, or whatever may be the degree of care and prudence exercised, and however directly the injury may result from the insufficiency of the road, no action whatever can be sustained against the town whose duty it is to maintain the road.<sup>4</sup> In Massachusetts and Maine, towns are not liable for injuries to a traveler by a defect in the highway where the weight of his load, exclusive of the carriage, exceeds six tons. In Vermont, the load must not exceed ten thousand pounds, exclusive of the carriage. In New Hampshire towns are not liable unless the felloes of the plaintiff's carriage, if two wheeled, are at least five inches wide, and if four wheeled, at least three and a half inches wide; and the load must not exceed, exclusive of the carriage, three tons. There are, doubtless, similar statutes in other states.

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<sup>1</sup> Bigelow v. Rutland, 4 Cush. 247.

<sup>2</sup> Dimock v. Sheffield, 30 Conn. 129; see Dennett v. Wellington, 15 Maine, 27.

<sup>3</sup> Tallahassee v. Fortune, 3 Fla. 19; Verrill v. Minot, 31 Maine, 299. But the rule is different in Massachusetts (see *ante*, § 409).

<sup>4</sup> Howe v. Castleton, 25 Verm. 162. In determining what constitutes the "load" within the meaning of the statute, reference is to be had only to the *material placed upon the carriage*, and not the carriage itself, or to any thing used or employed simply as means by which the removal or transportation of the material is effected (Ib.)

§ 419. A municipal corporation which has been compelled to pay damages to an individual for injuries caused by the unlawful use of a highway by a third person, has a remedy over against such person for the damages with which it has been charged, provided there was no fault on the part of the corporation which contributed to the injury.<sup>1</sup> In case of such contributory fault, no recovery can be had, for the reason that one of two joint wrong-doers cannot have contribution from the other.<sup>2</sup> And in a case where a municipal corporation was compelled to pay damages to a traveler who was injured by reason of the unprotected condition of an excavation in the street, which the corporation had employed a contractor to make, it was held that the corporation could not recover over against the contractor, unless the contract imposed upon the latter the duty of putting up barriers and lights. Otherwise it was the duty of the corporation to do this, and not to do so was negligence on its part, and not on the part of the contractor.<sup>3</sup>

§ 420. In all of the New England states the theory is, that there is no necessary privity between a traveler on a highway and any one but the town. If the highway is rendered unsafe or inconvenient by the acts of a third person, the town is nevertheless liable to a traveler who is injured thereby; but the town, on being sued by the traveler, may notify the party causing the defect of the fact, and require him to defend the action. If a recovery is had against the town, the statute gives it a right of action over for the amount thereof against the party by

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<sup>1</sup> *Chicago v. Robbins*, 2 Black, 418; *Robbins v. Chicago*, 4 Wallace, 657; *Phoenix v. Phoenixville Iron Co.*, 45 Penn. St. 135; *Boston v. Worthington*, 10 Gray, 496.

<sup>2</sup> *Chicago v. Robbins*, 2 Black, 418; but see to the contrary, *Littleton v. Richardson*, 32 N. H. 59.

<sup>3</sup> *Buffalo v. Holloway*, 7 N. Y. 493; affirming S. C., 14 Barb. 101.

whose wrongful act the injury complained of was occasioned.<sup>1</sup> In New Hampshire, and, perhaps, in some of the other New England states, the statute provides a remedy over by the town against its officers, through whose negligence the defect was not remedied.<sup>2</sup> Under the Maine statute it has been held that the town may recover, in addition to the damages which it had been compelled to pay, all the costs and reasonable expenses incurred in the suit against it by the injured person.<sup>3</sup> In New Hampshire, however, the remedy is limited to the damages and costs actually paid the injured party, and neither the expenses of defending the suit, nor of removing the incumbrance causing the injury, can be recovered by the town.<sup>4</sup> And, under the New Hampshire statute, it has been held (contrary to the rule stated in the last section) that a town is entitled to recover in such an action, notwithstanding its own fault in neglecting to repair the highway may have contributed to the injury.<sup>5</sup>

§ 421. To maintain an action for injuries caused by a defect in a highway, it must appear affirmatively, and the burden of proof is on the plaintiff to show, that he was in the lawful use of the highway,<sup>6</sup> that the defect actually

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<sup>1</sup> *Milford v. Holbrook*, 9 Allen, 417; *Lowell v. Short*, 4 Cush. 275; *Lowell v. Boston & Lowell R. Co.*, 23 Pick. 24; *Winship v. Enfield*, 42 N. H. 197; *Monmouth v. Gardiner*, 35 Maine, 247; *Hooksett v. Amoskeag &c. Co.*, 44 N. H. 105. A town is not precluded by one recovery against one person for damages sustained by his neglect from all future recovery for damages sustained by the same neglect, if the damage is several (*Newbury v. Conn. & Pass. River R. Co.*, 25 Verm. 377).

<sup>2</sup> In New Hampshire the liability of a surveyor of highways to the town for damages arising from the want of repairs in a highway, ceases when the surveyor has, within the scope of his authority and in good faith, caused all the taxes in his warrant to be worked out, unless a further amount be placed in his hands by the selectmen (*Patterson v. Colebrook*, 9 Foster, 94).

<sup>3</sup> *Veazie v. Penobscot R. Co.*, 49 Maine, 119.

<sup>4</sup> *Littleton v. Richardson*, 32 N. H. 59.

<sup>5</sup> *Littleton v. Richardson*, 32 N. H. 59.

<sup>6</sup> A road had been repaired by a parish, and persons on horseback had used it ;

existed, and that his injuries were caused by such defect.<sup>1</sup> To prove such defect as existing, it is not enough to show that another person, before the injury complained of, received a similar injury, at or near the same place, and from the same alleged defect.<sup>2</sup> To show, however, the general bad condition of the road, its condition in the immediate vicinity of the place where the accident occurred, is competent.<sup>3</sup> So long as there is any doubt as to the cause of the injury, the plaintiff is not entitled to recover. Thus, where a traveler's horse sickened and died shortly after receiving the alleged injury from a defect in the highway, proof of the perfect health of the horse up to the time of the accident will not throw the burden upon the town to prove that the death was not caused by the defect in the road.<sup>4</sup>

§ 422. The statutes of the New England states which impose a liability upon towns for injuries caused by defects in their highways, at the same time limit the recovery to the actual and direct damage to person and property. A party's entire damages, therefore, however disastrous they may be, are not necessarily recoverable.

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but there was no evidence that any carriage had gone along the whole length of it. Held, that the parish could not be convicted of non-repair of it on an indictment stating it to be a way for carriages; and that there should have been a count in the indictment charging it to be a way for horses (*Rex v. St. Leonard*, 5 Carr. & P. 579; and see *ante*, § 409).

<sup>1</sup> The plaintiff must not only show such want of repairs, but his injury thereby, in order to make out a *prima facie* case (*Lester v. Pittsford*, 7 Verm. 158; see *Perkins v. Concord R. Co.*, 44 N. H. 225).

<sup>2</sup> *Collins v. Dorchester*, 6 Cush. 396. But see *Packard v. New Bedford*, 9 Allen, 200. The jury are not to infer a defect in the highway at a particular time and place, merely from the fact that an injury was sustained at that time and place; but they may take that fact into consideration, in connection with the other facts of the case (*Church v. Cherryfield*, 33 Maine, 460; *Sherman v. Kortright*, (52 Barb. 267). Nor is the fact that a large number of persons had passed over a footway without accident, competent evidence that the footway was not a nuisance (*Temperance Hall Asso. v. Giles*, 4 Vroom, 260); but the contrary has been held in Connecticut (*Calkins v. Hartford*, 33 Conn. 57).

<sup>3</sup> *Cox v. Westchester Turnpike Co.*, 33 Barb. 414.

<sup>4</sup> *Libby v. Greenbush*, 20 Maine, 47.



Thus where, as in Maine, a person can recover only for "any bodily injury," or "any damage in his property," it is held that the word property means property *in rem*, some article whose value is destroyed or diminished. Therefore, a mere loss of one's time, or addition to his expenses, are not recoverable.<sup>1</sup> Prospective earnings by a minor child, or expense of medical attendance upon such child, are not recoverable by a father in Maine,<sup>2</sup> and the same doctrine is maintained in Connecticut and Massachusetts, where the statute provides for the recovery of damages for an injury "to the person or property."<sup>3</sup> But under the Vermont statute, which declares "any special damage" recoverable, a father may recover for the loss of the services of a minor son, and the expense of curing him of injuries caused by a defective road.<sup>4</sup> As to the words "bodily injury," in the Maine statute, they have been held to embrace bodily pain; and the loss of time, and the expense incurred in effecting a cure, are recoverable.<sup>5</sup> And this is also the rule in Massachusetts.<sup>6</sup>

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<sup>1</sup> Weeks v. Shirley, 33 Maine, 271; Brown v. Watson, 47 Id. 161; see State v. Hewett, 31 Id. 396, 400.

<sup>2</sup> Reed v. Belfast, 20 Maine, 246.

<sup>3</sup> Chidsey v. Canton, 17 Conn. 475; Harwood v. Lowell, 4 Cush. 310. But in an action by a husband and wife for an injury to the wife, the damages recoverable may include the loss of her labor resulting from the injury, and the expenses of a cure (Sanford v. Augusta, 32 Maine, 536). In an action against a town to recover damages for an injury received in consequence of a defective highway, it was held, that the defendant was liable for the increased damages (if any) arising from the unskillful treatment of the plaintiff, without any fault on his part, by a surgeon of ordinary professional skill and knowledge (Glover v. Bluehill, 51 Maine, 439). Where the court charged the jury that in estimating the damages of the plaintiff, whose horse had been injured by reason of the defective condition of defendant's bridge, they were not necessarily confined to the exact deterioration in the horse's value, but might take into consideration the fact that plaintiff had been put to the necessity of seeking redress in a court of justice, though the taxable costs were not to be considered, the charge was sustained (Beecher v. Derby Bridge & F. Co., 24 Conn. 491).

<sup>4</sup> Bailey v. Fairfield, Brayt. 126.

<sup>5</sup> Verrill v. Minot, 31 Maine, 299; Mason v. Ellsworth, 32 Id. 271; Sanford v. Augusta, 32 Id. 536.

<sup>6</sup> Canning v. Williamstown, 1 Cush. 451.

## CHAPTER XXIII.

### NOTARIES PUBLIC.

- SEC. 423. General rule of liability for negligence.  
424. Statutory liability.  
425. Liable to whom.  
426. Standard of care in presenting and protesting bills.  
427. Illustrations of the rule.  
428. Giving notice of dishonor of bills.  
429. Negligence must be direct cause of indorser's discharge.  
430. Defenses by notary.

§ 423. The office of notary is of ancient origin, and is known to all commercial civilized countries. In this country, a notary's chief functions are to note and protest bills of exchange, to note and draw up ship protests, and all other protests which are customary, according to the usage of merchants; and, in addition, notaries are very generally, if not universally, authorized to administer oaths and affirmations, and to take acknowledgments of deeds and other instruments.<sup>1</sup> They belong to that class of ministerial officers of whom we spoke in section 166, and they are, therefore, subject to the general rule that public officers having a ministerial duty to perform are liable in damages to any person specially injured by their omission to perform, or their unskillful performance of, that duty.<sup>2</sup>

§ 424. Besides this rule of liability, the statutes of the several states, in prescribing the powers and duties of no-

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<sup>1</sup> "The expression *notarial act*," says Brooke, in his treatise on the Office of a Notary (8d ed. p. 41), "is one which has a technical meaning, and it seems generally to signify the act of authenticating or certifying some document or circumstance by a written instrument, under the signature and official seal of a notary; or of authenticating or certifying as a notary some fact or circumstance by a written instrument under his signature only" (see *Fogarty v. Finlay*, 10 Cal. 239).

<sup>2</sup> See *ante*, § 168.

taries, generally declare their liability to a private action for damages resulting from any misconduct in office. Thus, in New York, the statute provides that "for any misconduct in any of the cases where notaries public, appointed under the authority of this state, are authorized to act, either by the laws of this state or of any other state, government or country, or by the law of nations, or by commercial usage, they shall be liable to the parties injured thereby for all damages sustained; and shall be subject to criminal prosecution and punishment, in the same cases, and in the same manner, in which other public officers of this state would be liable for misconduct in any official duty or act, authorized or enjoined by the laws of this state."<sup>1</sup>

§ 425. The fact that, in the protesting of bills of exchange, notaries are usually employed by bankers, to whom the owners of bills have entrusted them for collection, has given rise to a number of decisions as to the liability of such bankers for the negligence of a notary employed by them on behalf of the bill-holder. We have stated these decisions, and the rule deducible therefrom, in a previous section.<sup>2</sup> The rule adopted by the New York courts is, that in the performance of a strictly notarial function—that is, an act which only a notary, as such, can perform—a notary is liable directly to the person for whose benefit he is employed, and not solely to his immediate employer, the banker. But, in his employment by a bank to perform a non-notarial act, that is, an act which any person not a notary could perform with equal effect, such as the giving notices of non-acceptance or non-payment of an inland bill, he is simply a servant of the bank, to whom alone he is liable for his negligence. It is, however, well

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<sup>1</sup> 2 N. Y. Rev. Stat. 284, § 48.

<sup>2</sup> *Ante*, § 243.

settled law in the states of Massachusetts, Connecticut, Illinois, Pennsylvania, Maryland, Mississippi, Wisconsin, and Louisiana, that a banker, having employed a competent notary, is not, in any case, liable for his neglect to perform his duty; the notary being of course responsible for his own negligence to the owner of the bill.<sup>1</sup>

§ 426. A notary who receives a bill of exchange for the purpose of presenting it, and, in case of non-acceptance or non-payment, to protest it, is bound to use ordinary diligence in the matter so as to secure the rights of the owner against all the parties thereto. If, by reason of any omission or carelessness in the presentment, or in the protest, or in the giving notice thereof to the proper parties, the owner of the bill suffers loss, the delinquent notary is liable for the damages sustained. Having once undertaken to perform a strictly notarial act, *e. g.*, the presentment and protest of a foreign bill, he cannot delegate his powers to any other person. If he presents the bill, he only can protest it. He cannot depute another to present it, and he himself protest it, even though that other be also a notary,<sup>2</sup> for it is a general rule that a personal trust or power, conferred in confidence in the personal qualifications of an individual, cannot be delegated, and, indeed, that only such powers as are of a mechanical nature can be delegated.<sup>3</sup> It has been repeatedly adjudged that a notary must *per-*

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<sup>1</sup> *Fabens v. Mercantile Bank*, 23 Pick. 322; *Warren Bank v. Suffolk Bank*, 10 Cush. 582; *East Haddam Bank v. Scorvior*, 12 Conn. 303; *Bellemire v. Bank of U. S.*, 4 Whart. 105; *Jackson v. Union Bank*, 6 Harr. & J. 146; *Citizens' Bank v. Howell*, 8 Maryl. 530; *Tieman v. Commercial Bank*, 7 How. [Miss.] 648; *Bowling v. Arthur*, 34 Miss. 41; *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13; *Frazier v. New Orleans Gas Co.*, 2 Rob. [La.] 294; *Agricultural Bank v. Commercial Bank*, 7 Smedes & M. 592; *Ætna Ins. Co. v. Alton Bank*, 26 Ill. 243; *Stacy v. Dane County Bank*, 12 Wisc. 629. See *ante*, § 243.

<sup>2</sup> *Commercial Bank v. Varnum*, N. Y. Supreme Ct. 1869; *Commercial Bank v. Barksdale*, 36 Mo. 563.

<sup>3</sup> See *Ess v. Truscott*, 2 Mees. & W. 385; *Powell v. Tuttle*, 3 N. Y. 396, 407; *Newton v. Bronson*, 13 Id. 593; *Story on Agency*, § 14.

*sonally* present a bill which he intends to protest, and cannot delegate his authority to a clerk or agent.<sup>1</sup> A custom has long prevailed among notaries in New York city, and doubtless in other places, by which the presentment of inland bills and promissory notes is made by the notary's clerk. As such instruments, however, do not require strict protest, such presentment is not a strictly official act, and may be made by any one.<sup>2</sup> But a protest made under such circumstances is worthless, and cannot be used as evidence under the statutes which (in New York and other states) make the protest of an inland bill presumptive evidence of its dishonor.<sup>3</sup>

§ 427. It will not be deemed necessary for us to give even a summary of the very numerous reported cases in which indorsers of commercial paper have been released from liability on account of want of sufficient presentment or protest. These cases furnish many instances of carelessness on the part of notaries, but either because such acts of carelessness have not amounted to such culpable negligence as to be actionable, or because the notary's liability has been so fully conceded that no litigation has arisen, the books contain scarcely any cases against notaries for negligence in their official duties. It is clearly culpable negligence for a notary to protest a bill for non-pay-

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<sup>1</sup> *Onondaga Bank v. Bates*, 3 Hill, 53; *Chenowith v. Chamberlin*, 6 B. Monr. 60; *Carmichael v. Bank of Penna.*, 4 How. [Miss.] 567; *Sacridor v. Brown*, 3 McLean, 481; *Commercial Bank v. Barksdale*, 36 Mo. 563. In *Nelson v. Fetteral* (7 Leigh, 179), one of the judges expressed the opinion that a clerk regularly employed by the notary might present bills for him. But another judge expressed an opposite opinion, and it is clear that the court, as such, did not pass upon the question.

<sup>2</sup> It is the custom in England for clerks of notaries to present bills, whether foreign or inland, for acceptance or payment, the notary afterward noting the presentment and preparing his protest (*Brooke on the Office of a Notary*, 3d ed. 71, 128; see *Chitty on Bills*, 334).

<sup>3</sup> *Onondaga Bank v. Bates*, 3 Hill, 53.

ment before its maturity,<sup>1</sup> or to delay to demand payment until after its maturity.<sup>2</sup> The negligent omission to notify the proper parties of the dishonor of a bill, whereby the holder loses his remedy against any such parties, will make the notary liable. But a notary is not bound to know the residence of the parties to a bill. He is bound to know no one but the holder or the last indorser, and they should at all times be prepared to give him precise information as to the residence of the party whom they wish to charge. If the last indorser gives a notary a wrong direction as to the first indorser's residence, he ought not to complain that, in following his directions, the notary misdirected a notice of dishonor.<sup>3</sup> It has been remarked, however, that the fact that a notary was misdirected, especially by a stranger, is no excuse, if, by the exercise of reasonable diligence, he could have procured better and correct information.<sup>4</sup>

§ 428. Notice of the dishonor of a bill should be given, as soon as it reasonably can be, to *all* the antecedent parties on a foreign bill. But in the case of inland bills, which are not protestable by the rules of the commercial law, it is said not to be the duty of a notary to give notice of its dishonor to any party except the one from whom he received it. Nevertheless, where a statute enjoins upon a notary, in protesting promissory notes, the duty of giving such notice of dishonor as may be requisite to charge the parties to it, the notary is bound to notify *all* the antecedent parties.<sup>5</sup>

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<sup>1</sup> *Stacy v. Dane County Bank*, 12 Wisc. 629; *American Express Co. v. Egbert*, 21 Ind. 4. See *Mechanics' Bank v. Merchants' Bank*, 6 Mete. 13.

<sup>2</sup> See *Fabens v. Mercantile Bank*, 23 Pick. 330; *Warren Bank v. Suffolk Bank*, 10 Cush. 582; *Jackson v. Union Bank*, 6 Harr. & J. 146.

<sup>3</sup> See *Bellemire v. U. S. Bank*, 4 Whart. 105; *Bank of Mobile v. Marsden*, 7 Ala. [N. S.] 108; *Morgan v. Van Ingen*, 2 Johns. 204.

<sup>4</sup> See *Citizens' Bank v. Howell*, 8 Md. 530, 545.

<sup>5</sup> *Bowling v. Arthur*, 34 Miss. 41; see *Frazer v. New Orleans Gas Co.*, 2 Rob [La.] 294; *Allen v. Merchants' Bank*, 22 Wend. 215; reversing *S. C.*, 15 Id. 482; *Smedes v. Utica Bank*, 3 Cow. 663; 20 Johns. 372.

§ 429. It does not follow, because the holder of a bill has lost his remedy against an indorser for want of due presentment and demand made, and due notice of dishonor given to the indorser, that this is sufficient to maintain an action against the notary. It is necessary to go further, and prove that the discharge of the indorsers was attributable directly to the notary's neglect and want of skill.<sup>1</sup> The holder is not bound, however, to prosecute a fruitless suit against the indorser before he can maintain an action against his own agent for neglecting to make due demand of the maker, or to give notice of his default. The legal presumption is, that the indorser will, if sued, avail himself of his discharge.<sup>2</sup>

§ 430. Notwithstanding the negligence of a notary in the presentment, protest, or notice of dishonor of a bill, yet where the holder, being advised of such neglect, omits to avail himself of other grounds of action against the indorser, independent of the protest, *e. g.*, waiver of protest and notice by the indorser, he cannot claim to have lost his remedy against the indorser by the notary's negligence, and cannot, therefore, recover against the latter.<sup>3</sup> If, notwithstanding the notary had done his duty, the owner could not have recovered on the bill, the notary is not liable for his negligence, and, in an action against him, it would seem that the notary may avail himself of any defense which the party sought to be charged on the bill could have set up.<sup>4</sup>

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<sup>1</sup> *Emmerling v. Graham*, 14 La. Ann. 389; *Mechanics' Bank v. Merchants' Bank*, 6 Met c. 13.

<sup>2</sup> *Ib.*

<sup>3</sup> *Franklin v. Smith*, 21 Wend. 624. See *Van Wart v. Wooley*, 3 Barn. & Cr. 439; 5 Dowl. & R. 374; *Swinyard v. Bowes*, 5 Maule & S. 62; *Holbrow v. Wilkins*, 1 Barn. & Cr. 10.

<sup>4</sup> See *Reed v. Darlington*, 19 Iowa, 349.

## CHAPTER XXIV.

### PHYSICIANS AND SURGEONS.

- SEC. 431. Right to recover for services.  
432. Obligation of unpaid physician.  
433. Obligation of paid physician to use skill.  
434. Degree of skill required.  
435. He is bound to have skill.  
436. Standard of skill not absolute.  
437. Tests of skill.  
438. Character of disease may determine degree of skill.  
439. And so may the habits and tendencies of the patient.  
440. Physicians not liable for errors of judgment.  
441. Duty of continuing in attendance.  
442. Evidence of negligence and burden of proof.  
443. Contributory fault.

§ 431. In England, a *physician*, like an advocate, cannot recover fees by any legal process, as, by an ancient fiction, he is supposed to render his services from purely philanthropic motives ;<sup>1</sup> though a mere *surgeon* has a legal right to his fees. Accordingly, a physician in England is liable for his negligence only to the extent to which one is liable who renders a gratuitous service ; while a surgeon or apothecary is subject to the usual rules of liability. No such distinction exists, or appears ever to have existed, in this country. Physicians of all grades can sue for their fees,<sup>2</sup> and are liable for their negligence equally with surgeons.

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<sup>1</sup> In a late case (*Attorney-General v. Royal College of Physicians*, 7 Jur. [N. S.] 511), it was held that a physician might recover for professional services on a special contract.

<sup>2</sup> *Judah v. McNamee*, 3 Blackf. 269. Where a physician, during his attendance upon a patient (the defendant), having also attended patients infected by small-pox, and by want of proper care had communicated the infection to the defendant and his family, thus necessitating further attendance and an increased bill, it was held, in an action by the physician to recover for his services, that no recovery could be had for the additional services rendered necessary by the plaintiff's own want of proper care.



§ 432. A physician or surgeon attending gratuitously is liable for gross negligence only. Yet, as his duties relate more or less directly to the preservation of human life, it follows, upon the principles elsewhere stated,<sup>1</sup> that it may often be gross negligence in a physician to fail in giving such attention to his patient as would only be expected from a well-paid person in respect to matters of mere pecuniary value. Inasmuch as gratuitous services are more generally rendered by young and inexperienced physicians, than by those who are well established in their business, a presumption naturally arises that one who renders such services is not possessed of great skill, and was not supposed to be by the patient. This presumption may be overcome by proof to the contrary; and the physician may be judged by the standard to which he led the patient to believe that he had attained; or, if he has done nothing to mislead his patient upon this point, his responsibility will be measured by the degree of skill which he is proved actually to possess.

§ 433. Although a physician or surgeon may, doubtless, by express contract, undertake to perform a cure absolutely,<sup>2</sup> the law will not imply such a contract from the

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and that the defendant was entitled to a further deduction from that portion of the bill which was properly chargeable, sufficient to reimburse him for all damages which he had sustained by bodily suffering and loss of time (*Piper v. Meniffee*, 12 B. Monr. 465).

<sup>1</sup> *Ante*, § 24.

<sup>2</sup> See *Leighton v. Sargent*, 7 Foster, 468. When a declaration alleged that, whereas the defendant who, holding himself out as a physician and surgeon, was "retained and employed by the plaintiff to set, dress, take care of, manage, and cure a certain broken thigh bone," &c., "and in consideration of the premises and certain large sums of money," &c., "as such physician and surgeon, undertook and promised to set, dress, take care of, and manage, as such physician and surgeon, said broken bone in a proper, prudent, and skillful manner;" held, that this was not a special undertaking or promise to cure the plaintiff, but only such as the law implies, viz., to use reasonable professional skill and attention to that end (*Reynolds v. Graves*, 3 Wisc. 416).

mere employment of a physician.<sup>1</sup> A physician is not a warrantor or insurer of a cure, and is not to be tried by the result of his remedies.<sup>2</sup> His only contract is to treat the case with reasonable diligence and skill. If more than this is expected, it must be expressly stipulated for.<sup>3</sup>

§ 434. The general rule, therefore, is, that a medical man, who attends for a fee, is liable for such a want of ordinary care, diligence, or skill upon his part, as leads to the injury of his patient.<sup>4</sup> To render him liable, it is not enough that there has been a less degree of skill than some other medical men might have shown, or a less degree of

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<sup>1</sup> *Gallagher v. Thompson*, Wright [Ohio], 466; *McCandless v. McWha*, 22 Penn. St. 261. In the last case the judge charged the jury that "the defendant was bound to bring to his aid the skill necessary for a surgeon to set the leg so as to make it straight and of equal length with the other when healed; and if he did not, he was accountable in damages, just as a stonemason or bricklayer would be in building a wall of poor materials, and the wall fell down, or if they built a chimney and it should smoke by reason of want of skill in its construction." But this proposition was repudiated by the court, on appeal. Woodward, J., said: "The implied contract of a physician or surgeon is not to cure—to restore a limb to its natural perfectness—but to treat the case with diligence and skill. The fracture may be so complicated that no skill vouchsafed to man can restore original straightness and length; or the patient may, by willful disregard of the surgeon's directions, impair the effect of the best-contrived measures. He deals not with insensate matter, like the stonemason or bricklayer, who can choose their materials and adjust them according to mathematical lines, but he has a suffering human being to treat, a nervous system to tranquilize, and a will to regulate and control."

<sup>2</sup> *Hancke v. Hooper*, 7 Carr. & P. 81; *McCandless v. McWha*, 22 Penn. St. 261.

<sup>3</sup> In *McCandless v. McWha* (*supra*), Woodward, J., said, that by reasonable skill and diligence the court meant "such as thoroughly educated surgeons ordinarily employ." Where one holds himself out to the public as a physician and surgeon, the law implies a promise and duty on his part that he will use reasonable skill and diligence in the treatment, and for the cure of those who may employ him (*Reynolds v. Graves*, 3 Wisc. 416; *Patten v. Wiggin*, 51 Maine, 594).

<sup>4</sup> *Landon v. Humphrey*, 9 Conn. 209; *Wood v. Clapp*, 4 Sneed, 65; *Bellinger v. Craigie*, 31 Barb. 534; *Briggs v. Taylor*, 28 Verm. 180; *Lamphier v. Phipos*, 8 Carr. & P. 475; *McNevin v. Lowe*, 40 Ill. 209. To render a medical man liable, even civilly, for negligence or want of due care or skill, it is not enough that there has been a less degree of skill than some other medical men might have shown, or a less degree of care than even he himself might have bestowed; nor is it enough that he himself acknowledges some degree of want of care; there must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result (*Rich v. Pierpont*, 3 Fost. & F. 35).

care than even he himself might have bestowed; nor is it enough that he himself acknowledged some degree of want of care; there must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result.

§ 435. But a physician or surgeon is bound not only to use such skill as he has, but to have a reasonable degree of skill.<sup>1</sup> The law will not countenance quackery; and although the law does not require the most thorough education or the largest experience, it does require that an uneducated, ignorant man shall not, under the pretense of being a well qualified physician, attempt recklessly and blindly to administer medicines or perform surgical operations.<sup>2</sup> If the practitioner, however, frankly informs the patient of his want of skill, or the patient is in some other way fully aware of it, the latter cannot complain of the lack of that which he knew did not exist.<sup>3</sup>

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<sup>1</sup> A physician or surgeon who offers himself to the public as a practitioner, impliedly promises thereby the possession of the knowledge and skill requisite to enable him to treat with reasonable success such cases as he may undertake (*Patten v. Wiggin*, 51 Maine, 594). In *Bellinger v. Craigue* (31 Barb. 534), it was held that the obligation to use care and skill was so essential a part of a doctor's title to compensation, that a recovery of judgment for his services necessarily involved a determination that he had used due care, so as to bar any action upon his negligence; and this, notwithstanding all defense on the ground of negligence was expressly waived in the action brought by the doctor. *Mullin, J.*, dissented; and, as it seems to us, had the weight of reason upon his side. A medical man is not bound to have more than the ordinary skill and judgment of members of his profession (*Howard v. Grover*, 28 Maine, 97; see *Bournan v. Woods*, 1 Greene [Iowa], 441; *Gallaher v. Thompson*, *Wright* [Ohio], 466]. In an action by a person who had been a patient at a hospital, for maltreatment there by two surgeons, it appearing that the alleged maltreatment was in the administration of a hot bath which they had ordered, but which it was no part of their ordinary duty personally to direct and superintend, and at the actual administration of which they were not present; held, that he was not entitled to expect more than the usual and ordinary degree of care and attention at the hands of the surgeons, and that if they were not personally cognizant of the alleged ill-usage, they were not liable (*Perionowsky v. Freeman*, 4 Fost. & F. 977).

<sup>2</sup> *Long v. Morrison*, 14 Ind. 595; *Richey v. West*, 23 Ill. 385; *Fowler v. Sergeant*, 1 Grant [Pa.] 355; *Wood v. Clapp*, 4 Sneed, 65.

<sup>3</sup> A person not qualified, as not being a regular medical practitioner, but assuming to be or to practice as such, and undertaking to treat another for a disease, is

§ 436. The standard of skill may vary according to circumstances, and may be different even in the same state or country. In country towns, and in unsettled portions of the country remote from cities, physicians, though well informed in theory, are but seldom called upon to perform difficult operations in surgery, and do not enjoy the greater opportunities of daily observation and practice which large cities afford. It would be unreasonable to exact from one in such circumstances that high degree of skill which an extensive and constant practice in hospitals or large cities would imply a physician to be possessed of. A physician, though inexperienced and unlearned, may in some circumstances undertake an operation, and in such case he is bound only to use the best skill he has; for, as has been remarked,<sup>1</sup> "many persons would be left to die if irregular surgeons were not allowed to practice."

§ 437. None but the most general tests of a physician's skill can be stated as rules of law. The great variance between the medical theories which find acceptance among different schools, each of which has its sincere and devoted adherents, and each being, in the estimation of its opponents, mere quackery, make it impossible to assert, as a proposition of law, that any particular system affords an exclusive test of skill.<sup>2</sup> But one who professes

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liable for injury caused by ignorant and improper treatment, by which the patient is rendered worse instead of better, and is injured by the use of improper medicines (Ruddock v. Lowe, 4 Fost. & F. 519).

<sup>1</sup> Rex v. Van Butchell, 3 Carr. & P. 629; and see McCandless v. McWha, 22 Penn. St. 268. In Rex v. Simpson, 4 Carr. & P. 407, *note*, Bayley, B., said: "If a person not of medical education, *where professional aid might be obtained*, undertakes to administer medicine which might have a dangerous effect, and thereby occasions death, such person is guilty of manslaughter."

<sup>2</sup> Thus, in Corsi v. Maretzek (4 E. D. Smith, 1), it was held that a homeopathic physician stood upon an equality before the law with allopathic practitioners. And one who professed to follow the "botanic system" was held to have done all that could be asked of him by following its rules (Bournan v. Woods, 1 Greene [Iowa]).

to adhere to a particular school must come up to its average standard, and must be judged by its tests, and in the light of the present day.<sup>1</sup> Thus, a physician who should now practice the reckless and indiscriminate bleeding which was in high repute thirty years ago, or should shut up a patient in fever, and deny all cooling drinks, would doubtless find the old practice a poor excuse for his imbecility. So, if a professed homeopathist should violate all the canons of homeopathy, he would be bound to show some very good reason for his conduct, if it was attended with injurious effects. Upon many points of medical and surgical practice, all the schools are agreed; and indeed, common sense and universal experience prescribe some invariable rules, to violate which may generally be called gross negligence.<sup>2</sup>

§ 438. The state of health of the patient may have much weight in determining whether ordinary diligence and care have been used by the attending physician. What might be deemed ordinary care in some circumstances would be gross negligence in others. A disease known to be rapid and dangerous will require a more instant and careful attention and application of remedies, than one comparatively harmless, and requiring only good nursing.<sup>3</sup>

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441; see *Commonwealth v. Thompson*, 6 Mass. 134). And yet it has been held, in North Carolina, that what is reasonable skill and due care in a physician, in the treatment of a patient, is a question of law, and it is error to leave it to be determined by the jury (*Woodward v. Hancock*, 7 Jones Law [N. C.] 384).

<sup>1</sup> In *Simonds v. Henry* (39 Maine, 155), the court charged the jury "that if the plaintiff exercised all the knowledge and skill to which the art at that time had advanced, that would be all that would be required of him." But this was regarded as too high a standard of professional duty, and a new trial was ordered.

<sup>2</sup> Thus a failure to remove the *placenta* after childbirth is highly culpable negligence (see *Lynch v. Davis*, 12 How. Pr. 323).

<sup>3</sup> Dr. Elwell, in his work on *Malpractice* (p. 38), observes: "It undoubtedly requires a higher degree of skill for the successful and safe treatment of *iritis* than that required in rheumatism, because, in the former case, the most important and delicate structure of the system is involved, the parts of which when affected with

§ 439. Aside from the manipulation of a fractured limb, a surgeon has to contend with very many powerful and hidden influences, such as the habits, hereditary tendencies, vital force, mental state, and local circumstances of the patient. While, on the one hand, these will explain his ill success and moderate the degree of his responsibility, it would seem that he is bound to inform himself of these facts, so far at least as they would be likely to influence, in the management of the case, the conduct of a prudent physician. We should say, for example, that a physician about to administer an anæsthetic, is bound to inform himself as to the condition of the patient's heart, lungs, or other organs, which, if diseased, would warn a prudent physician against the administration of that beneficent agency.<sup>1</sup>

§ 440. A physician, like an attorney, is not answerable in a given case, for the errors of an enlightened judgment,<sup>2</sup> but, like an attorney also, he cannot interpose his judgment contrary to that which is settled. He must apply, without mistake, what is settled in his profession. He cannot try experiments with his patients to their injury.<sup>3</sup>

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an inflammation may soon be destroyed, so rapid and dangerous is the disease; and unless treated intelligently and with great promptness, blindness quickly supervenes; while in rheumatism, but little, perhaps nothing, can be done hastily, it being a disease of the joints and muscular system, usually requiring a long course of treatment, giving to the attending physician full time to study his case and apply his means of cure."

<sup>1</sup> See *Jones v. Fay*, 4 Fost. & F. 525.

<sup>2</sup> *McLallon v. Adams*, 19 Pick. 333. But see *Howard v. Grover*, 28 Maine, 97. In that case, the jury rendered a verdict against a surgeon for a large sum, "the alleged fault consisting in an *error of judgment* in not removing more of the limb." The court reduced the verdict merely, a decision we think not maintainable either upon principle or authority (see *Twombly v. Leach*, 11 Cush. 397). The defendant, a surgeon, having been employed by a railway company to examine the plaintiff, one of its passengers who had sustained an injury in a collision on its line, and he having done so, so far as he could see or judge of the plaintiff's statement of his injuries, told him that they were so slight that he accepted a small sum in compensation. Held, that even assuming that his injuries were greater, there was no ground of action (*Pim v. Roper*, 2 Fost. & F. 783).

<sup>3</sup> *Patten v. Wiggin*, 51 Maine, 594. In *Slater v. Baker* (2 Wils. 259), the court,

§ 441. The peculiar nature of the services which a medical man undertakes to render, often makes it his duty to continue them long after he would gladly cease to do so. He may, no doubt, decline absolutely to take charge of a case ; but having once begun the task, he cannot abandon it as freely. Even if his services are gratuitous, he must continue them until reasonable time has been given to procure other attendance ; and if he is not attending gratuitously, he has no right to desert a patient, before the end of the illness which he undertook to treat, without reasonable cause. The propriety of this rule is obvious in some instances, and is easily demonstrable in all cases. Thus, no one can doubt that, even where his attendance was gratuitous, a surgeon could not be allowed to cut off a limb, and then leave the patient to stop the flow of blood as best he could ; and this, although an extreme case, proves that there must be a rule adequate to secure justice for such a case. That a paid physician must continue his attendance, if desired, until the emergency which he was called to meet is past, seems to be not only reasonable in itself, but to be sustained by analogy from the rule which requires lawyers to conduct their clients' causes to trial and judgment, after they have once undertaken them.<sup>1</sup> A patient is surely as much entitled to the continuance of his physician's service during a single illness, as a client to that of his lawyer's aid during the progress of a single action.

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in speaking of the conduct of the defendant, a surgeon, said : " The court cannot help saying that, in this particular case, he has acted ignorantly and unskillfully, contrary to the known rule and usage of surgeons." In *Rex v. Long* (4 Carr. & P. 423), Bayley, B., said : " The defendant has acted with gross and improper rashness and want of caution " (and see *Rex v. Martin*, 2 Id. 625).

<sup>1</sup> See *ante*, § 223. In an action on the case against a physician for malpractice, it is not competent for the plaintiff to give evidence that the defendant abandoned the patient and refused to attend upon him unless the cause of action be so laid in the declaration (*Bemus v. Howard*, 3 Watts, 255).

§ 442. In an action against a physician or surgeon, the plaintiff must affirmatively prove all the elements of the negligence charged, including the defendant's want of knowledge or skill, where that is relied upon.<sup>1</sup> This may, however, be done by simple evidence of the mode of treatment pursued by the defendant in the particular case. If that indicates want of skill, it is not necessary to go outside the case for proof upon that point.<sup>2</sup> The defendant may, however, produce evidence of his general skill, where an issue is made upon his *possession* of skill, and not merely upon his *use* of it. And where there is much doubt as to the skillfulness of his treatment of the particular case, evidence of his general skillfulness will be material upon all the issues of the cause; for if he had skill, it is natural to presume that he used it. But where the plaintiff does not question the defendant's general skillfulness, evidence thereof is not competent on behalf of the defendant in a case not otherwise evenly balanced.<sup>3</sup> But to rebut evidence introduced by the defendant to support his general professional character, it is competent to show that he was not a regularly bred physician.<sup>4</sup>

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<sup>1</sup> Leighton v. Sargent, 11 Foster, 119.

<sup>2</sup> *Ib.* In an action against a surgeon, want of general skill not being imputed to the defendant, and the jury having found for the defendant on the question of negligence in the particular operation, the court refused a new trial (*Seare v. Prentice*, 8 East, 348). But Lord Ellenborough dissented from the language of the charge, "that unless negligence was proved, the jury could not examine into the want of skill." In an action on the case brought by a husband and wife against a surgeon for malpractice in attempting to deliver the wife of a child, it was averred "that the defendant ignorantly, unskillfully, and negligently omitted to deliver the wife for two days, contrary to the well-known rules of practice in such cases." And that "the defendant did so ignorantly, unskillfully, and wickedly behave himself in attempting to deliver the wife that she suffered great and unnecessary pain," &c., "and received lasting and irreparable injuries and wounds." Held, that particular acts of misconduct of the defendant might be given in evidence to sustain the general allegations in the declaration; and that it was competent for the plaintiff to show by what means such injuries and wounds were received (*Grannis v. Branden*, 5 Day, 260).

<sup>3</sup> *Mertz v. Detweiler*, 8 Watts & Serg. 376; *Seare v. Prentice*, 8 East, 348.

<sup>4</sup> *Grannis v. Branden*, 5 Day, 260. In that case, it was also held that evidence of



§ 443. Where the plaintiff relies upon the fact of his non-recovery or slow recovery as some evidence of the defendant's unskillfulness or neglect, the defendant is at liberty to prove any thing tending to show that the fault was in the patient, and not in the treatment. It is the duty of the patient to co-operate with his professional adviser, and to conform to the proper and necessary prescription; and, if he will not, or, under the pressure of pain, cannot, his neglect is his own wrong or misfortune, for which he has no right to hold his surgeon responsible.<sup>1</sup> Thus, where the plaintiff complained of delay in healing a broken leg, it was held proper for the defendant to show that intemperance aggravated the evils of such an accident, and that the plaintiff had been an intemperate man for some years before his leg was broken.<sup>2</sup>

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the declaration of the defendant, that the cause of his difficulty was owing to the patient's having the venereal disease (it being proved that she did not have it), was admissible, only, however, for the purpose of showing the ignorance of defendant as to the state of the case.

<sup>1</sup> *McCandless v. McWha*, 22 Penn. St. 261.

<sup>2</sup> *McCandless v. McWha*, 25 Penn. St. 95. In that case, however, evidence of the plaintiff's habits was confined to such a period as was first designated by the scientific witnesses as one within which intemperate habits would affect the patient's recovery in such a contingency.

## CHAPTER XXV.

### CONSTRUCTION AND MAINTENANCE OF RAILROADS.

- SEC. 444. Care in respect to railroad track.  
445. What dangers must be provided against.  
446. Care required in laying track on highway.  
447. Care in respect to accessories of railroads.  
448. Defects, how proved.  
449. Rights of compensated land-owners.  
450. Obligations to lessees and their passengers.  
451. Interference with highway.  
452. Restoration of roads and bridges.  
453. Road bridges over railroads.

§ 444. A railroad company is bound to lay its track and road-bed in such a manner, and to keep them in such condition, as to make the road safe for the use of its passengers,<sup>1</sup> and of all persons having a right to pass over it, or to be upon it, or to have their property thereon.<sup>2</sup> And where it has regular crossings, it ought to provide lights, so as to prevent passers-by from stumbling over obstacles;<sup>3</sup> and

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<sup>1</sup> *Great Western R. Co. v. Fawcett*, 1 Moore P. C. [N. S.] 101; 9 Jur. [N. S.] 339. And it does not exonerate itself from this responsibility by the employment of a competent and careful person to build the road. If the road is not in fact well built, the company's liability remains (*Grote v. Chester & Holyhead R. Co.*, 2 Exch. 251; *Virginia &c. R. Co. v. Sanger*, 15 Gratt. 230).

<sup>2</sup> The duty to keep a road in sufficient repair is a condition attendant upon the grant of the franchise to construct it for profit, which, from its very nature, inures to the benefit of all who may have occasion to use the thoroughfare. The right of action accrues to whoever is injured in person or property by the negligence of the company. General property in the thing injured, without actual possession, gives a right to sue; and no doubt one having a special interest at the moment of injury might also sustain an action (*Cumberland Valley R. Co. v. Hughes*, 11 Penn. St. 141).

<sup>3</sup> A railway passenger was set down after dark, on the side of the line opposite to the station and place of egress. The train was detained more than ten minutes at this place, and from its length blocked up the ordinary crossing to the station, which is on the level. The ticket collector stood near the crossing with a light, telling the passengers, as they delivered their tickets, to pass on. The passenger passed down the train to cross behind it, and, from the want of light, stumbled over some hampers, and was injured. The practice of passengers had been to pass behind the train, when

though it is not in general bound to light any portion of the track not assigned for crossings,<sup>1</sup> yet it must light every part which is so used with its consent.<sup>2</sup> It is bound to provide sufficient culverts for the escape of water collected by its embankments or excavations,<sup>3</sup> so that the water shall neither weaken the road-bed, nor create a nuisance upon adjoining lands.

§ 445. A railroad company is, however, only bound to provide against dangers which can reasonably be foreseen ;<sup>4</sup> and it is not guilty of culpable negligence in not securing the track against events which could not be anticipated by reasonable men of the ordinary sagacity required in the business, such, for example, as an unprecedented flood<sup>5</sup> or

long, without interference from the railway company. Held, that these facts disclosed evidence for the jury of negligence on the part of the company (*Nicholson v. Lancashire & Yorkshire R. Co.*, 3 Hurlst. & C. 534).

<sup>1</sup> A person crossing a railway at a part where there was no footpath, and which was unlighted, fell into a hole and dislocated his shoulder. In an action against the company for negligence, held, that it was not bound to light the line at that place where there was no recognized footpath, that it was not therefore guilty of negligence, and that plaintiff could not recover (*Paddock v. Northeastern R. Co.*, 16 Law Times [N. S.] 639).

<sup>2</sup> *Nicholson v. Lancashire & Yorkshire &c. R. Co.*, *supra*.

<sup>3</sup> *Johnson v. Atlantic &c. R. Co.*, 35 N. H. 569. In that case, the judge charged that *if the jury found that there was no difficulty* in building a suitable culvert to draw the water off the meadow, and that the water was flowed back upon the meadow by the embankment, either in consequence of the bottom of the culvert not being sunk low enough to drain the meadow, or in consequence of the culvert not being connected by ditches cut low enough to carry the water of the meadow through the culvert to the natural or other channels of the water below, the plaintiff was entitled to recover. To this instruction the defendant excepted, and, on appeal, the court held that the charge was a proper one. •

<sup>4</sup> *Bramwell, B., Cornman v. Eastern Cos. R. Co.*, 4 Hurlst. & N. 781, 786.

<sup>5</sup> *Withers v. North Kent R. Co.*, 27 L. J. [Exch.] 417; 3 Hurlst. & N. [Am. ed.] 969. In that case, it was shown that the railroad was laid on an embankment built of sandy soil, in a marshy country subject to floods, and that the culverts were insufficient at times to carry off the water. But it did not appear that the embankment had ever been affected by floods, although it had been in use for five years, until the night upon which the plaintiff was traveling, in which an extraordinary flood had carried away the soil from under the track, and the cars were thrown off. It was held that this was no evidence of negligence. In *Pittsburg, Ft. Wayne &c. R. Co. v. Gilleland* (56 Penn. St. 445), it was held, that a railroad company was not bound to provide culverts sufficient to pass *extraordinary* floods, although not *unprecedented*.

frost.<sup>1</sup> But dangers which might reasonably be expected to occur, though rarely, must be guarded against.<sup>2</sup>

§ 446. In laying down a railroad upon a public highway, ordinary care and skill must be used to make the track harmless to persons, animals, or vehicles passing along the highway.<sup>3</sup> And, as in other cases, the degree of care and skill required is to be estimated in view of the whole circumstances, taking into account the obvious risk of danger to travelers, and the necessity of caution to avoid numerous injuries.<sup>4</sup> Thus, the rails ought not to be so laid as to entangle horses' feet, if by ordinary skill such a result could be avoided;<sup>5</sup> nor should the rails be raised so much above the level of the highway that wagons cannot conveniently pass over them.<sup>6</sup> The construction and use of a running switch on a highway in the midst of a popu-

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<sup>1</sup> See *Blyth v. Birmingham Waterworks Co.*, 11 Exch. 781.

<sup>2</sup> A railway embankment fell and caused the death of passengers, whose representatives sued the company for negligence, and the defense was that the railway was properly constructed and was daily inspected, but that it was owing to the violence of a storm that the embankment gave way. Held, 1. That where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to *prima facie* evidence of its insufficiency; and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it; 2. That the judge ought to have called the attention of the jury to the evidence as to the extraordinary state of the weather, and asked them whether they were satisfied that the storm was so extraordinary that no experience could have anticipated its occurrence (*Great Western R. Co. v. Fawcett*, 1 Moore P. C. [N. S.] 101; 9 Jur. [N. S.] 339; 11 Weekly Rep. 444; 8 Law Times [N. S.] 31). A railroad company, having undertaken to lay down its track along a street which is a public road, is bound to lay it down properly, and to keep it in a proper condition; and where, by the sinking of the pavement, a spike in the rail was left exposed, with which the plaintiff's carriage coming in contact, the plaintiff was thrown out and injured, held, that the company was guilty of negligence, and the plaintiff might recover (*Fash v. Third Av. R. Co.*, 1 Daly, 148).

<sup>3</sup> *Mazetti v. Harlem R. Co.*, 3 E. D. Smith, 98; *Fash v. Third Avenue R. Co.*, 1 Daly, 148.

<sup>4</sup> *Mazetti v. Harlem R. Co.*, 3 E. D. Smith, 98.

<sup>5</sup> *Mazetti v. Harlem R. Co.*, 3 E. D. Smith, 98. And see *Pittsburg, Ft. Wayne & c. R. Co. v. Dunn*, 56 Penn. St. 280.

<sup>6</sup> *Milwaukee & c. R. Co. v. Hunter*, 11 Wis. 160.

lous town or village, is of itself an act of gross and criminal negligence on the part of a railroad company. Any person who, without negligence on his part, is injured by the operation of a running switch so situated, may recover of the company for the damages sustained, without other proof of negligence than the existence of the switch.<sup>1</sup> The track must be kept in good condition, as far as by the use of ordinary care it can be done;<sup>2</sup> nor is the failure of the town to repair the highway upon which a railroad is laid, even though it is bound to do so, any excuse to the company for letting its track fall out of repair.<sup>3</sup> But a railroad company, if legally authorized to lay its track upon a highway, is liable only for its negligence in performing or maintaining the work, and cannot be made responsible for injuries unavoidably resulting from the presence of the rails upon the highway.<sup>4</sup>

§ 447. The obligation of care on the part of a railroad company extends, of course, to all the accessories of its business, as well as to the track itself. It is bound to have such locomotives, cars, brakes,<sup>5</sup> turn-tables, &c., as are least likely to do injury, while sufficient for the require-

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<sup>1</sup> *Brown v. N. Y. Central R. Co.*, 32 N. Y. 597. A "running switch" is one constructed so that while a train approaches with considerable speed, the car to be left behind may be disconnected, the forward part of the train passing rapidly over the switch, the rear part is somewhat checked, the intermediate car is switched off, and the switch can be replaced in season for the two ends of the train to unite without stopping.

<sup>2</sup> *Fash v. Third Av. R. Co.*, 1 Daly, 148.

<sup>3</sup> *Ib*; *Gillett v. Western R. Co.*, 8 Allen, 560. A railroad company which so constructs and maintains its road-bed, at its intersection with a highway, as to render the highway dangerous or inconvenient to travelers thereon, is liable for an injury sustained by a traveler upon the highway in consequence of the defect, though he have a remedy against the town or city which was bound to keep the highway in repair (*Snow v. Housatonic R. Co.*, 8 Allen, 441; *Gillett v. Western R. Co.*, 8 Allen, 560).

<sup>4</sup> *Mazetti v. Harlem R. Co.*, 3 E. D. Smith, 98; *Lackland v. North Missouri R. Co.*, 34 Mo. 259; *Towle v. Eastern R. Co.*, 17 N. H. 519.

<sup>5</sup> *Owen v. Hudson Riv. R. Co.*, 7 Bosw. 329; *Oldfield v. Harlem R. Co.*, 3 E. D. Smith, 103; see S. C., 14 N. Y. 310. So the best switches must be used (*Smith v. N. Y. & Harlem R. Co.*, 19 N. Y. 127; affirming S. C., 6 Duer, 225).

ments of its business. So its stations or depots must be built and arranged with care, properly lighted when dark,<sup>1</sup> and otherwise made safe and convenient for persons lawfully entering therein for the transaction of business,<sup>2</sup> and with suitable conveniences for passengers alighting from trains.<sup>3</sup> But it is in these, as in other matters,<sup>4</sup> only bound

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<sup>1</sup> *Martin v. Great Northern R. Co.*, 16 C. B. 179. In *Cornman v. Eastern Cos. R. Co.* (4 Hurlst. & N. 781, 784), Watson, B., expressed the opinion that this was the only ground upon which that case could be supported. See also *Burgess v. Great Western R. Co.*, 32 Law Times, 76; 6 C. B. [N. S. Am. ed.] 923. To establish a case of negligence against a railway company, and consequent liability for damage for injury happening in consequence of an alleged defectiveness in an erection for the use of their passengers, it must be proved that the erection was an improper one for its purpose, and it is not sufficient to show that by some alterations it might have been made more safe (*Crafter v. Metropolitan Railway Co.*, 1 Harr. & R. 164; S. C., Law Rep. C. P. 300; *Toomey v. London, Brighton &c. Railway Co.*, 3 C. B. [N. S.] 146).

<sup>2</sup> Where flaps on the platform were imperfectly turned back, and the plaintiff fell over them, he recovered damages (—— v. *Southeastern R. Co.*, cited, 4 Hurlst. & N. 784). So the company would be liable for injuries received through the breaking down of a platform insufficiently constructed; and the fact that it broke down under the mere weight of the persons on it, however numerous, would be evidence upon which a jury might find that the company was guilty of negligence (*Channell, B., Cornman v. Eastern Counties R. Co.*, 4 Hurlst. & N. 787). And the existence of an opening in the platform, through which any one might fall, would imply negligence (*Martin, B., S. C.*, p. 785). But a person coming on the platform from mere curiosity cannot recover for injuries sustained by its fall (*Gillis v. Pennsylvania R. Co.*, 59 Penn. St. 129). In *Burgess v. Great Western R. Co.* (32 Law Times, 76; 6 C. B. [N. S. Am. ed.] 923), it seems to have been held that a railway company is bound to fence in its station so that passengers cannot mistake the way. Such is not the law in America; but it is probable that a company leaving, as in that case, a pit in the way which passengers would naturally take to the station, would be held responsible. A railway company, for the more convenient access of passengers between the two platforms of a station, erected across the line a wooden bridge, which the jury found to be dangerous. Held, that the company was liable for the death of a passenger through the faulty construction of this bridge, although there was a safer one about one hundred yards further round, which the deceased might have used (*Longmore v. Great Western R. Co.*, 19 C. B. [N. S.] 183).

<sup>3</sup> *Foy v. London, Brighton &c. R. Co.*, 18 C. B. [N. S.] 225; see further upon this subject, *ante*, § 277.

<sup>4</sup> Where a staircase led from a railroad to the street, with a wall at each side, without any hand-rail, the steps being faced with brass, and over forty thousand persons had passed over it without injury, the plaintiff himself having continually traveled over it for eighteen months without complaint, though he finally slipped upon one of the steps, where the brass had been worn smooth by constant travel, it was held that the jury had no right to convict the company of negligence in using

to use ordinary care, except in favor of passengers.<sup>1</sup> It is not negligence to keep apparatus, necessary for the business of a railroad, in a place convenient for use, where it is in full view, and no one could reasonably be expected to be endangered by it, even though under the pressure of a crowd one does in fact stumble over it.<sup>2</sup> The company has a right to reserve any part of its buildings for its own use; and, having indicated that it has done so, in a manner sufficient to warn persons using ordinary care that they have no business there, it is not bound to keep such places in a condition which will make it safe for any persons, other than its own servants, to enter.<sup>3</sup>

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brass instead of lead, and in not providing a hand-rail, although two witnesses testified that in their opinion the injury might have been avoided by such a change (*Crafter v. Metropolitan R. Co.*, Law Rep. 1 C. P. 300; S. C., 1 Harr. & R. 164; see also *Rigg v. Manchester &c. R. Co.*, 12 Jur. [N. S.] 525; S. C., 14 Weekly Rep. 834). In *Davis v. London, Brighton &c. R. Co.* (2 Fost. & F. 588), the plaintiff recovered for an injury suffered from the extreme slipperiness of stairs leading to the defendant's railway.

<sup>1</sup> See *ante*, § 266.

<sup>2</sup> *Cornman v. Eastern Counties R. Co.*, 4 Hurlst. & N. 781. In that case, it appeared that a large weighing machine had been kept for five years on the platform, for the purpose of weighing passengers' luggage, without injury to any one, until the plaintiff, pressed by a crowd of people, fell over it and was injured. It was proved that the machine projected some six inches beyond the platform, and that upon some other railroads precautions had been taken against danger from similar machines which had not been taken in this case. But a verdict for the plaintiff was set aside, and a nonsuit entered. Bramwell, B., concurred, solely on the ground that the accident was one which could not reasonably be foreseen.

<sup>3</sup> *Sweeny v. Old Colony R. Co.*, 10 Allen, 385. Thus, in *Toomey v. London, Brighton &c. R. Co.* (3 C. B. [N. S.] 146), the plaintiff, being unable to read, inquired of a stranger for the urinal, mistook the direction, and entered the next room, which was marked on the outside "lamp room," and in which the company's lamps were kept. This room being dark, he fell down some steps at the entrance. There was no proof that these steps were badly constructed. Held, no evidence of negligence on the part of the company. So the company is not responsible to one who is injured by defects in machinery, if he has no business to go within its reach. Thus, where a passenger walked, uninvited and without necessity, under a heavy package, while it was being hoisted by a crane, which broke and let the package fall upon him, it was held that the company was not in fault as to him, owing him no duty in respect to the crane, having no reason to expect that people would pass under it (*Griffiths v. London & Northwestern R. Co.*, 14 Law Times [N. S.] 797).

§ 448. The defective condition of a railroad, or of any thing connected with it, may be proved by evidence of its condition immediately or shortly after the occurrence of the injury complained of, if there is no reasonable suggestion that it was or could have been changed for the worse in the interval.<sup>1</sup> The question whether proper care has been used in the construction of a railroad, is, in general, a question of fact for the jury.<sup>2</sup>

§ 449. The compensation which a landowner receives for the right of way through his property is measured upon the assumption that the railroad will be constructed and managed with ordinary care; and if he suffers from the want of such care on the part of the railroad company, a landowner is not debarred from recovery therefor by his receipt of compensation for his land.<sup>3</sup> So it is assumed that the company will promptly remove from adjoining land any thing that in the course of construction falls there (as, for example, fragments of rock driven out in blasting); and for its failure to do so an action lies, irrespective of the compensation awarded for the land taken and damage necessarily to be suffered.<sup>4</sup> But for injuries

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<sup>1</sup> Milwaukee &c. R. Co. v. Hunter, 11 Wisc. 160.

<sup>2</sup> Brown v. Mohawk & Hudson R. Co., How. App. Cas. 52; Poler v. N. Y. Central R. Co., 16 N. Y. 476; compare Crafter v. Metropolitan R. Co., Law Rep. 1 C. P. 300.

<sup>3</sup> Waterman v. Connecticut &c. R. Co., 30 Verm. 610; Pittsburg, Ft. Wayne &c. R. Co. v. Gilleland, 56 Penn. St. 445. A railroad company, sued for damages resulting from overflowing plaintiff's land in consequence of its works, must show that all due and reasonable precautions were taken in the construction, and that nothing was done wantonly or carelessly to cause unnecessary damages to plaintiff's property, in order to confine the plaintiff to the statute remedy for compensation. If it does not show this, the action will lie (Mellen v. Western R. Co., 4 Gray, 301; Johnson v. Atlantic &c. R. Co., 35 N. H. 569; but compare Robinson v. N. Y. & Erie R. Co., 27 Barb. 512; Chase v. N. Y. Central R. Co., 24 Id. 273).

<sup>4</sup> Although a railroad corporation have a right to throw stones, by blasting in a proper manner, upon adjoining lands, still it is their duty to remove the stones thus thrown upon the adjoining lands in a reasonable time; and if they fail so to remove them, they will be liable for the damage or injury that the owner of the land sustains in consequence of such neglect of removal (Sabin v. Vermont Central R. Co., 25 Verm. 362).



which naturally follow the use of the land for the purposes of a railroad, and which could not be avoided by the use of ordinary care, such a landowner cannot recover.<sup>1</sup>

§ 450. Under the well-settled rule, that no covenants as to the condition of the property are implied in a lease of real estate, there can be no doubt that none of the obligations mentioned in this chapter bind a railroad company in favor of a lessee of the road, and that the latter must take the road as he finds it.<sup>2</sup> And it follows that passengers and others, deriving their rights from the lessee, cannot hold the lessor responsible for any defects in the condition of the road.<sup>3</sup> The exemption of the leasing company has been carried even farther.<sup>4</sup>

§ 451. When a railroad company, in the course of constructing its road, finds it necessary to interfere with a highway, it is bound to exercise its rights in the manner which will the least obstruct the ordinary use of the high-

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<sup>1</sup> Where an owner of land grants a portion of it to a railroad company for its railroad, he holds his land subject to the consequences attendant upon the use of the portion granted, and particularly such as would result from the running of engines, and the consequent exposure of property on his adjacent land to such injury and loss as would naturally result therefrom with ordinary care on the part of the company (*Rood v. N. Y. & Erie R. Co.*, 18 Barb. 80). Where the damage done by blasting rocks, or in any similar mode, in the course of the construction of a railway, is done to land, a portion of which is taken by the company under compulsory powers, this damage will not lay the foundation of an action in any form, as it should be taken into account in estimating the compensation to the landowner for the portion of land taken (*Brown v. Providence & C. R. Co.*, 5 Gray, 1). Where the right of way is granted to a railroad company, and it is necessary, to render it practicable for the purposes of the road, to dig a deep cut through the ground, the company is not bound to build walls to prevent the banks from falling in, and for the protection of the adjoining property (*Horstman v. Covington & Lexington R. Co.*, 18 B. Monr. 218; but compare *Richardson v. Vermont Central R. Co.*, 25 Vt. 465).

<sup>2</sup> *Murch v. Concord R. Co.*, 9 Foster, 9.

<sup>3</sup> *Ib.*

<sup>4</sup> Where one railroad company allowed another to lay a track on a bridge erected by the former, it was held not liable for an injury caused by defects created in the bridge by the negligence of the other company (*Gwathmey v. Little Miami R. Co.*, 12 Ohio St. 92).

way; and if it is necessary to do any act which will make travel thereon difficult or dangerous, the company must use ordinary care to warn travelers of the danger, and to protect them therefrom, and is liable to them for any injuries which could have been obviated by the use of such care.<sup>1</sup> And where, through the fault of the company, such an injury occurs, for which the town is compelled in the first instance to pay damages, the town may recover the damages so paid by it from the company.<sup>2</sup>

§ 452. Railroad companies are generally required by statute to restore roads, streams, and bridges, with which they have interfered, to such condition as will not impair the usefulness of such roads, streams, or bridges.<sup>3</sup> We

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<sup>1</sup> *Veazie v. Penobscot R. Co.*, 49 Maine, 119. A corporation which was authorized to construct a railroad, had occasion in so doing to cut through a highway situated in the plaintiff's town, and which the latter were bound to keep in repair. In the progress of the work it became necessary, to prevent travelers from falling into the deep cut at the intersection of the highway, to raise barriers, which, though voluntarily erected by the company, were afterward approved and adopted by the selectmen of the town. Subsequently, for the purpose of removing stone and rubbish from the cut, the barriers were taken down by persons in the defendant's employ, and in consequence of the negligence of the workmen to replace them at night, when leaving the works, a traveler sustained an injury. Held, that the company was bound to cause the barriers to be replaced at night, although no such duty was enjoined by its charter, as otherwise an accident might have happened before the town had notice, actual or constructive, and no one would have been responsible for the damages (*Lowell v. Boston & Lowell R. Co.*, 23 Pick. 24).

<sup>2</sup> *Lowell v. Boston & Lowell R. Co.*, 23 Pick. 24; *Brooklyn v. Brooklyn R. Co.*, Gen. Term, New York, 1870; see also *Duxbury v. Vermont Central R. Co.*, 26 Verm. 751; *Veazie v. Penobscot R. Co.*, 49 Maine, 119.

<sup>3</sup> Such is the case in Great Britain, the New England States, New York, &c. Thus, in New York and Michigan, the general railroad acts authorize every railroad company "to construct their road across, along, or upon any stream of water, water-course, street, highway, plank-road, turnpike, or canal, which the route of its road shall intersect or touch; but the company shall restore the stream or water-course, street, highway, plank-road, and turnpike thus intersected or touched to its former state, or to such state as not unnecessarily to have impaired its usefulness" (N. Y. Stat. 1850, ch. 140, § 28; 1 Mich. Comp. Stat. [1857], ch. 57, § 1961). In Illinois and Wisconsin, statutes precisely alike provide that, "when it shall be necessary for the construction of any railroad, to cross the track of any other railroad, stream of water, water-course, road, or highway which it may intersect or cross by reason of such extension into or through any adjoining state, or by reason of its consolidation

think they are bound to do this by force of the common law, where there is no statutory regulation on the subject; for it can scarcely be supposed that the legislature intends in any case to allow a railroad company needlessly and permanently to destroy a public way. The company must restore the *whole* of a road, however wide, and it is not enough for it to put the part usually traveled in order.<sup>1</sup> Where a railroad company neglects its duty in this respect, and the town is compelled to pay damages to a person injured by a defect in the road caused by the neglect of the company, the town may recover the amount thus paid from the company.<sup>2</sup> It has been held in Vermont that the company discharges all its obligations in this respect by using proper care at the time to restore the highway, and that it is not bound to keep watch upon it afterward, nor to repair future deteriorations.<sup>3</sup> But the

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with any other road or roads, company or companies, as provided in this act, it shall be lawful for said company to construct their road across or over the same by such track or tracks, bridge or bridges, viaduct or viaducts as may be necessary to the convenience of the extension or consolidation of said road; provided said company shall restore the railroad, stream of water, water-course, road, or highway thus intersected or crossed, to its former state, or in a sufficient manner not materially to interfere with its usefulness" (Ill. Rev. Stat. [1858], p. 952, § 8; Wisc. Rev. Stat. [1858], ch. 79, § 8).

<sup>1</sup> *Judson v. N. Y. & N. Haven R. Co.*, 29 Conn. 434. There the road was twelve rods wide, with two paths, one on each side, and an open common between. The railroad crossed it, and the company put so much of the road as was usually traveled into good order again, but put a culvert in the center, and left it uncovered. This being filled up with snow in the winter, the plaintiff fell into it and was injured. The company was held liable for damages.

<sup>2</sup> *Hamden v. New Haven & Northampton R. Co.*, 27 Conn. 158. The court said, in that case: "The town is prevented from interfering with the building of the railroad by the authority of the legislature until the company has completed its works; yet while in this condition it is held liable for a neglect which it has no power to prevent. It is equitable, therefore, that the party whose absolute duty it is to restore the road to its former state of usefulness should indemnify it from the consequences of such liability. And it appears to us that it would be unjust to apply to the town the principle that there shall be no contribution between joint wrongdoers."

<sup>3</sup> Where a railroad company, in the course of the construction of its road, lawfully turned a stream of water, restoring it to its former state as nearly as practicable,

contrary has been adjudged in New York, in respect to alterations made in the course of a stream,<sup>1</sup> and to changes made in a highway.<sup>2</sup>

§ 453. Railroad companies in Great Britain and Ireland are required by statute<sup>3</sup> to carry highways over or under their roads by bridges in certain cases, and to keep the approaches to those bridges in order, as well as the bridges themselves, and the entire material of the road over the bridges.<sup>4</sup> But where the railroad passes *over* the highway by a bridge, and for this purpose the grade of the highway is lowered at that spot, the company is not bound to keep any part of the highway in repair, after having once put it into good condition.<sup>5</sup>

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and the new channel was properly guarded, so far as could be perceived at the time of turning it,—held, that the company was not obliged thereafter to watch the operation of the water, and take precautions to prevent its encroaching upon adjoining lands (*Norris v. Vermont Central R. Co.*, 28 Verm. 99).

<sup>1</sup> *Cott v. Lewiston R. Co.*, 36 N. Y. 214; 34 How. Pr. 222.

<sup>2</sup> *People v. Troy & Boston R. Co.*, 37 How. Pr. 427.

<sup>3</sup> Stat. 8 & 9 Vic. c. 20, § 46 For a peculiar case, in which this provision of the statute was held to be incorporated in a special charter, see *Bristol & Exeter R. Co. v. Tucker*, 13 C. B. [N. S.] 207.

<sup>4</sup> The obligation is not merely to keep the bridges in such order that the municipal authorities can maintain the roads over them, but to provide for the entire road (*North Staffordshire R. Co. v. Dale*, 8 El. & Bl. 836).

<sup>5</sup> *London & Northwestern R. Co. v. Skerton*, 5 Best & S. 559; *Fosberry v. Waterford & Limerick R. Co.*, 13 Irish C. L. 494; *Waterford & Limerick R. Co. v. Kearney*, 12 Id. 224).

## CHAPTER XXVI.

### RAILROAD FENCES.

- SEC. 454. The common law rule.  
455. Unequal operation of this rule.  
456. Statutory rules.  
456 a. Who bound by these statutes.  
457. When fence must be made.  
458. Fences must be sufficient.  
459. Fences must be maintained.  
460. Fences where not required.  
461. Fences and cattle guards in towns.  
462. Injury must be owing to defect of fence.  
463. Effect of adjoining owners' agreement to fence.  
464. Effect of receipt of compensation for land.  
465. Effect of railroad company's agreement to fence.  
466. Liability of company using another's track for defects of fences.  
467. Liability of lessees.  
468. Liability of agents and contractors.  
469. Who may claim benefit of statutes concerning fences.  
470. When company entitled to notice of defect in fences.  
471. Contributory fault, when an excuse.  
472. Liability where fences are maintained.  
473. Rule in Maryland and Georgia.  
474. Rule in Ohio, Iowa, &c.  
475. Peculiar statutes.  
476. Effect of sanction of public officer.

§ 454. At common law, a railroad company, like any other proprietor of land, is under no obligation (except in its capacity as a common carrier) to fence its road,<sup>1</sup> and trespassers come thereon at their peril. Accordingly, it is well settled, wherever this rule of the common law pre-

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<sup>1</sup> N. Y. & Erie R. Co. v. Skinner, 19 Penn. St. 301; North Penn. R. Co. v. Rehman, 49 Id. 101; Coy v. Utica &c. R. Co., 23 Barb. 643; Williams v. Michigan Central R. Co., 2 Mich. 259; Alton &c. R. Co. v. Baugh, 14 Ill. 211; Chicago & M. R. Co. v. Patchin, 16 Id. 198; Lafayette &c. R. Co. v. Shriver, 6 Ind. 141; Knight v. New Orleans, Opelousas &c. R. Co., 15 La. Ann. 105; Henry v. Dubuque &c. R. Co., 2 Iowa, 288; Towns v. Cheshire R. Co., 1 Foster, 363; Cornwall v. Sullivan R. Co., 8 Id. 161; Northeastern R. Co. v. Sineath, 8 Rich. Law, 185; see Rex v. Pease, 4 B. & Ad. 30.

vails, that in the absence of statutory regulations, the owner of an animal which is injured upon the track of a railroad, the land belonging to the company, cannot recover damages therefor, without proof of actual negligence in the company, apart from the lack of a fence,<sup>1</sup> nor without showing either that the animal was lawfully upon the track,<sup>2</sup> or that the company caused the injury by want of ordinary care to avoid it after its servants knew, or ought to have known, of the animal's presence upon the track.<sup>3</sup> If an adjoining land-owner kept his cattle within

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<sup>1</sup> Galpin v. Chicago &c. R. Co., 19 Wisc. 604; Terre Haute &c. R. Co. v. Augustus, 21 Ill. 186; Brown v. Hannibal & St. Jo. R. Co., 33 Mo. 309; see Housatonic R. Co. v. Knowles, 30 Conn. 313. Where a railroad company, which was not obliged to fence unless requested by the land-owner, agreed with an adjoining owner not to fence against his land, and a cow strayed from such lands upon the track of the road and was killed by one of their trains, held, that the owner of the cow, having by his own fault contributed to the loss, could not recover of the company (Tower v. Providence & Worcester R. Co., 2 R. I. 404).

<sup>2</sup> Munger v. Tonawanda R. Co., 4 N. Y. 349; 5 Denio, 255; Bowman v. Troy & Boston R. Co., 37 Barb. 516; N. Y. & Erie R. Co. v. Skinner, 19 Penn. St. 301; North Penn. R. Co. v. Rehman, 49 Id. 101; Mentges v. Harlem R. Co., 1 Hilt. 425; Staats v. Hudson River R. Co., 23 How. Pr. 463; Perkins v. Eastern R. Co., 29 Maine, 307; Towns v. Cheshire R. Co., 1 Foster, 363; Illinois Central R. Co. v. Reedy, 17 Ill. 580; Illinois Central R. Co. v. Phelps, 29 Id. 447; Chicago & Miss. R. Co. v. Patchin, 16 Id. 198; see Corwin v. N. Y. & Erie R. Co., 13 N. Y. 42. Compare, however, Quimby v. Vermont Central R. Co., 23 Verm. 387. Proof that the owner of the injured animal used all reasonable care to keep it off the track does not help his claim (North Penn. R. Co. v. Rehman, 49 Penn. St. 101). In Iowa, cattle having a right to run at large, this rule does not apply (Balcom v. Dubuque &c. R. Co., 21 Iowa, 102).

<sup>3</sup> This qualification is demanded by the rule stated in sections 25 and 36, and though overlooked in some cases, is supported by Lafayette &c. R. Co. v. Shriner, 6 Ind. 141; Illinois Central R. Co. v. Phelps, 29 Ill. 447; New Albany &c. R. Co. v. McNamara, 11 Ind. 543; Jackson v. Rutland & Burlington R. Co., 25 Verm. 150; Trow v. Vermont Central R. Co., 24 Id. 487; Pritchard v. La Crosse &c. R. Co., 7 Wisc. 232; Isbell v. N. Y. & N. Haven R. Co., 27 Conn. 393; Macon &c. R. Co. v. Lester, 30 Geo. 911; see Stucke v. Milwaukee &c. R. Co., 9 Wisc. 202; Williams v. Michigan Central R. Co., 2 Mich. 259; Bowman v. Troy & Boston R. Co., 37 Barb. 516, 520. In other cases it is said that where cattle, running at large, stray upon a railroad at a point not fenced, nor required by law to be fenced, and are killed by an engine through inexcusable negligence of the company's servants, the company will be held liable (Indianapolis & Cincinnati R. Co. v. Caldwell, 9 Ind. 397), or that where a company is not bound by law to fence its road, it is only liable for injury to animals resulting from wantonness or gross negligence (Illinois Central R. Co. v.

a fence which was broken down by the negligence of the railroad company's servants, the company would of course be liable for injuries suffered by the cattle from its trains, after they had passed upon the track through the breach thus made.<sup>1</sup>

§ 455. It was soon felt, however, that the rigid application of this doctrine of the common law to a novel state of facts was calculated to work practical injustice, and especially to lead to a great amount of cruelty to valuable animals. The rule of the common law was established at a period when cattle suffered but little injury from their trespasses, when no vehicle ordinarily traveled at a rate exceeding ten or twelve miles an hour, and few attained to that speed. A straying horse always, and a straying ox generally, could avoid collision with such travelers. But the introduction of steam as a motive-power changed all this, and exposed straying cattle to a new danger, which could only be avoided by an activity unnatural to most of them, or by keeping them entirely off the road. Against such dangers new precautions are required; and the common law not being able to provide them, the subject has been generally regulated by statutes requiring railroad companies to fence their tracks.

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Phelps, 29 Ill. 447; Louisville &c. R. Co. v. Ballard, 2 Metc. [Ky.] 177; compare Stearns v. Old Colony &c. R. Co., 1 Allen, 493; Vicksburg & Jackson R. Co. v. Patten, 31 Miss. 156). Where it appeared that the train of a railroad was running at a speed greater than usual upon a straight part of the road in the day-time, and that one of several cattle, that were feeding near and crossing the road, was killed by the locomotive, it was held to be negligence that the speed of the train was not lessened, nor the usual mode of driving off stock by blowing of a steam-whistle resorted to (Aycock v. Wilmington &c. R. Co. 6 Jones [N. C.] Law, 231). Where it appeared by the plaintiff's testimony that his horse had been injured on a railroad by the running of a train against it, and it was left doubtful from defendant's testimony whether the brakes had been applied to the wheels of the train after the animal was discovered to be on the track, it was held that the presumption of negligence raised by the act of 1856, chap. 7, was not repelled (Clark v. Western &c. R. Co., 1 Winston [N. C.] Law, 109).

<sup>1</sup> Wright v. Indianapolis & Cincinnati R. Co., 18 Ind. 168.

§ 456. In the state of New York, the general railroad act requires every railroad company to erect and maintain fences on both sides of the road, and cattle guards at every road crossing, in default of which the company is made responsible for all injuries inflicted by its agents or engines upon animals,<sup>1</sup> whether by negligence or not,<sup>2</sup> and without regard to what would generally be deemed contributory negligence on the part of the owner of such animals, or to the fact that they were trespassing when

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<sup>1</sup> "Every corporation formed under this act shall erect and maintain fences on the sides of their road, of the height and strength of a division fence required by law, with openings or gates or bars therein, and farm crossings of the road for the use of the proprietors of the lands adjoining such railroad; and also construct and maintain cattle guards at all road crossings, suitable and sufficient to prevent cattle and animals from getting on to the railroad. Until such fences and cattle guards shall be duly made, the corporation and its agents shall be liable for all damages which shall be done by their agents or engines, to cattle, horses, or other animals thereon; and after such fences and guards shall be duly made and maintained, the corporation shall not be liable for any such damages, unless negligently or willfully done" (2 N. Y. Rev. Stat. [5th ed.] 689; N. Y. Stat. 1850, ch. 140, § 44; Stat. 1848, ch. 140, § 42; see *Staats v. Hudson River R. Co.*, 3 Keyes, 196; 33 How. Pr. 139). The provisions of this statute were extended to all other railroad companies, by Stat. 1854, ch. 282, § 8. These regulations apply to all railroads in the state, whether chartered before or since the general railroad law (*Suydam v. Moore*, 8 Barb. 358; *Waldron v. Rensselaer &c. R. Co.*, 8 Barb. 390), and to foreign corporations, as well as domestic ones (see *Labussiere v. New Haven R. Co.*, 10 Abb. Pr. 398, *note*; overruling in effect a county judge's decision to the contrary on the same page). A clause in the charter of a railroad company, providing that no one may do any thing "to detract from or affect its profits," does not exempt it from the operation of these statutes (*Indianapolis &c. R. Co. v. Kercheval*, 16 Ind. 84). The appointment of a receiver of the road does not relieve the company from the duty and liability created by these statutes (*Ohio & Miss. R. Co. v. Fitch*, 20 Ind. 498; *McKinney v. Ohio & Miss. R. Co.*, 22 Ind. 99). The statutes requiring railroads to be fenced in, do not impose on railroad companies any liability for injuries caused to fields by cattle getting into them, in consequence of the railroads not being fenced (*Clark's Adm'x v. Hannibal & St. Jo. R. Co.*, 36 Mo. 202).

<sup>2</sup> *Smith v. Eastern R. Co.*, 35 N. H. 356; *Galena & Chicago R. Co. v. Crawford*, 25 Ill. 529; *Miles v. Hannibal & St. Jo. R. Co.*, 31 Mo. 407; *Jeffersonville &c. R. Co. v. Dunlop*, 29 Ind. 426; *McCall v. Chamberlain*, 13 Wisc. 637; *Blair v. Milwaukee &c. R. Co.*, 20 Wisc. 254; *Chicago &c. R. Co. v. Utley*, 38 Ill. 410; see *Terre Haute &c. R. Co. v. Augustus*, 21 Ill. 186; *Williams v. New Albany &c. R. Co.*, 5 Ind. 111; *Norris v. Androscoggin R. Co.*, 39 Me. 273; *Gorman v. Pacific R. Co.*, 26 Mo. 441; *Toledo &c. R. Co. v. Thomas*, 18 Ind. 215; *McKinney v. Ohio &c. R. Co.*, 22 Ind. 99; compare *Alger v. Mississippi &c. R. Co.*, 10 Iowa, 268.



injured.<sup>1</sup> Similar statutes have been enacted in England,<sup>2</sup> Maine,<sup>3</sup> New Hampshire,<sup>4</sup> Vermont,<sup>5</sup> Massachusetts,<sup>6</sup>

<sup>1</sup> This is the settled construction of the statute (*Corwin v. N. Y. & Erie R. Co.*, 13 N. Y. 42; *Shepard v. Buffalo &c. R. Co.*, 35 N. Y. 641; *Waldron v. Rensselaer &c. R. Co.*, 8 Barb. 390; *Suydam v. Moore*, Id. 358, overruling *Marsh v. N. Y. & Erie R. Co.*, 14 Barb. 364; and *Halloran v. N. Y. & Harlem R. Co.*, 2 E. D. Smith, 257).

<sup>2</sup> Stat. 8 & 9 Vic. c. 20 (called the Railway Clauses Consolidation Act), § 68, provides that "The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway. \* \* \* Also sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout, by reason of the railway, together with all necessary gates made to open toward such adjoining lands, and not toward the railway, and all necessary stiles; and such posts, rails, and other fences shall be made forthwith after the taking of any such lands, if the owners thereof shall so require, and the said other works as soon as conveniently may be." The same statute (§ 47) provides that "if the railway cross any turnpike road or public carriage road on a level, the company shall erect, and at all times maintain, good and sufficient gates across such road, on each side of the railway where the same shall communicate therewith, and shall employ proper persons to open and shut such gates; and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross such railway; and such gates shall be of such dimensions and so constructed as, when closed, to fence in the railway, and prevent cattle or horses passing along the road from entering upon the railway."

<sup>3</sup> "Legal and sufficient fences are to be made on each side of land taken for a railroad, where it passes through inclosed or improved land, or wood lots belonging to a farm, before a construction of the road is commenced, and they are to be maintained and kept in good repair by the corporation. For any neglect of it during the construction of the road, and for injuries thereby occasioned by its servants, agents, or contractors, the directors are jointly and severally personally liable" (*Maine Rev. Stat.* [1867] chap. 51, § 23; see *Norris v. Androscoggin R. Co.*, 39 Maine, 273).

<sup>4</sup> By N. H. Stat. 1850, ch. 953, §§ 5 & 6, every railroad corporation in this state is "required to make and maintain all necessary cattle-guards, cattle-passes, and farm-crossings, and to keep a sufficient and lawful fence on both sides of the road for the convenience and safety of the land-owners along the line thereof." (See *Smith v. Eastern R. Co.*, 35 N. H. 356; *Horn v. Atlantic & St. Lawrence R. Co.*, Id. 169).

<sup>5</sup> Vermont Gen. Stat. ch. 28, § 47.

<sup>6</sup> See *Rogers v. Newburyport &c. R. Co.*, 1 Allen, 16. "Each corporation shall erect and maintain suitable fences, with convenient bars, gates, or openings therein, at such places as may reasonably be required upon both sides of the entire length of any railway which it shall have constructed subsequently to the 16th day of May, in the year 1846, except at the crossings of a turnpike, highway, or other way, or in places where a convenient use of the road would be thereby obstructed. And shall also construct

Connecticut,<sup>1</sup> Illinois,<sup>2</sup> Michigan,<sup>3</sup> Missouri,<sup>4</sup> and Wisconsin

and maintain sufficient barriers at such places as may be necessary, and where it is practicable so to do, to prevent the entrance of cattle upon the road" (Mass. Gen. Stat. [1860], chap. 63, § 43).

<sup>1</sup> By Conn. Gen. Stat., p. 190, ch. 7. § 489, it is provided that "Every railroad company which has been incorporated since the first Wednesday of May, 1850, or which shall be hereafter incorporated, shall erect and maintain good and sufficient fences on both sides of its railroad throughout its whole extent, except at such places as, in the opinion of the railroad commissioners, the erection and maintenance of the same shall be inexpedient or unnecessary."

<sup>2</sup> By the Illinois statute (2 Rev. Stat. 953) it is provided, "That every railroad corporation whose line of road, or any part thereof, is open for use, shall, within six months after the passage of this act, and every railroad company formed, or to be formed, but whose lines are not now open for use, shall within six months after the lines of such railroad, or any part thereof, are open, erect and thereafter maintain fences on the sides of their road, or the part thereof so open for use, suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting on to such railroad, except at the crossing of public roads and highways, \* \* \* and shall also construct, where the same has not already been done, and hereafter maintain, at all road-crossings now existing or hereafter established, cattle-guards suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting on to such railroad; and so long as such fences and cattle-guards shall not be made after the time, hereinbefore prescribed for making the same shall have elapsed, and when such fences and cattle-guards are not in good repair, such railroad corporation and its agents shall be liable for all damages which shall be done by the agents or engines of any such corporation to any cattle, horses, sheep, or hogs thereon" (and see *Galena & Chicago R. Co. v. Crawford*, 25 Ill. 529; *Terre Haute &c. R. Co. v. Augustus*, 21 Ill. 186).

<sup>3</sup> By Comp. Stat. of Michigan, 1867, ch. 67, § 1987, it is provided that "Every railroad corporation formed under this act shall erect and maintain fences on the sides of their road, of the height and strength of a division fence required by law, with suitable openings and gates therein, and convenient farm-crossings of the road, for the use of the proprietors of lands adjoining such railroad, and also to construct and maintain cattle-guards at all road-crossings, suitable and sufficient to prevent cattle and animals from getting on to the railroad; until such fences and cattle-guards shall be duly made, the corporation and its agents shall be liable for all damages which shall be done by their agents or engines, to cattle, horses, or other animals thereon" (and see *Gardner v. Smith*, 7 Mich. 410).

<sup>4</sup> The statute of Missouri (Gen. Stat. 1865, ch. 63, § 43) is as follows: "Every railroad corporation formed or to be formed in this state, and every corporation formed or to be formed under this chapter, shall erect and maintain good and substantial fences on the sides of the road where the same passes through, along, or adjoining inclosed or cultivated fields, or unclosed prairie lands, of the height of at least five feet, with openings and gates or bars therein, \* \* \* and also to construct and maintain cattle-guards at all railroad crossings where fences are required as aforesaid, suitable and sufficient to prevent horses, cattle, mules, and all other animals from getting on the railroad. \* \* \* After such fences, gates, or bars, farm-crossings, and cattle-guards shall be duly made and maintained, said corporations shall not be liable for any such damages, unless negligently or will-

sin,<sup>1</sup> and are construed in the same manner. The statute of Indiana is not quite so broad.<sup>2</sup> It simply requires every railroad to be "securely fenced." This is construed as requiring cattle-guards at highway crossings.<sup>3</sup>

§ 456 a. These statutes do not apply to cases of inju-

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fully done. \* \* \* Until such fences, openings, and gates or bars, farm-crossings, and cattle-guards shall be duly made and maintained, such corporation shall be liable in double the amount for all damages which shall be done by its agents, engines, or cars, to horses, cattle, mules, or other animals escaping from, or coming upon, said lands, fields, or inclosures, occasioned in either case by the failure to construct or maintain such fences or cattle-guards" (see *Burton v. North Missouri R. Co.*, 30 Mo. 372).

<sup>1</sup> By the statute of Wisconsin (1860, ch. 268, § 1) it is provided that "Every railroad company, or other party having the control or management of a railroad, the whole or part of which shall be located in this state, shall, and is hereby required to, erect, within twelve months from and after the passage of this act, and maintain, good and sufficient fences on both sides of such road (depot grounds excepted), of the height of four and a half feet, with openings or gates or bars therein, and farm-crossings of the road for the use of the proprietors of the lands adjoining such railroad; and also construct and maintain cattle-guards at all highway crossings, to prevent cattle and other animals from getting on such railroad; until such fences and cattle-guards shall be duly made, the railroad company, its agent or agents, the trustees, lessees, or other parties having control and management of any such road, shall be liable for all damages which shall be done by the agents or engines, to cattle, horses, or other domestic animals therein, occasioned by the failure to erect such fences or cattle-guards as herein required" (see *McCall v. Chamberlain*, 13 Wisc. 637).

<sup>2</sup> Laws 1859, p. 105. A similar statute, passed in 1853 (Laws 1853, p. 113), applied only to actions before a justice of the peace (*Jeffersonville R. Co. v. Martin*, 10 Ind. 416), but was construed in the same manner (*Indianapolis &c. R. Co. v. Townsend*, 10 Ind. 38). Under the peculiar wording of this statute, it is held that railroad companies are not liable for animals injured by defects in the road, or by fright, but only for injuries directly inflicted by a locomotive (*Peru &c. R. Co. v. Hasket*, 10 Ind. 409). In *Toledo &c. R. Co. v. Fowler* (22 Ind. 316), it was said that the statute requiring railroads to be fenced, was not intended to change the common-law rule as to the duty of the owners of cattle, nor merely to give them compensation for animals killed or injured on the road where it is not fenced, but chiefly as a police regulation for the benefit of the public, to secure the safety and freedom from obstruction to the passage of carriages along the track. This view, however, is nowhere else accepted, and is not at all applicable to the statutes of the other states.

<sup>3</sup> *New Albany &c. R. Co. v. Pace*, 13 Ind. 411; *Indianapolis &c. R. Co. v. Kibby*, 28 Ind. 479.

ries suffered before their enactment;<sup>1</sup> but they are generally made applicable to railroad companies previously chartered. It is within the power of a legislature to make the statute so applicable, even though no right to amend the charter was reserved.<sup>2</sup> Such of these statutes as only mention "railroad corporations and their agents," do not impose any duty upon *individuals* owning or running a railroad.<sup>3</sup>

§ 457. Where the statute prescribes no particular time within which a railroad fence must be put up (which is the case in most states), the liability of the company for cattle injured on its road commences as soon as it takes possession of the land upon which the road is to be laid.<sup>4</sup> But in Illinois a railroad company is allowed six months, from the opening of the road, within which to complete its fences; and the statutory liability does not therefore commence until the expiration of that period.<sup>5</sup> And if, before that period, the company puts up a fence, it is not liable, until after the six months elapse, for failing to maintain the fence.<sup>6</sup>

§ 458. The fences, gates, and cattle-guards must be sufficient to keep out all ordinary kinds of cattle, sheep,

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<sup>1</sup> *Indianapolis &c. R. Co. v. Elliott*, 20 Ind. 430; *Evansville & Crawfordsville R. Co. v. Ross*, 12 Ind. 446.

<sup>2</sup> *Thorpe v. Rutland & Burlington R. Co.*, 27 Verm. 140; and see *Madison & Indianapolis R. Co. v. Whiteneck*, 8 Ind. 217; *New Albany & Salem R. Co. v. Tilton*, 12 Ind. 3; *Jones v. Galena &c. R. Co.*, 16 Iowa, 6; *Bulkley v. New York & New Haven R. Co.*, 27 Conn. 479; *Suydam v. Moore*, 8 Barb. 358; *Waldron v. Rensselaer & Saratoga R. Co.*, Id. 390; *Talmadge v. Rensselaer & Saratoga R. Co.*, 13 Id. 493; *Trice v. Hannibal & St. Joseph R. Co.*, 35 Mo. 188. But compare *Milliman v. Oswego & Syracuse R. Co.*, 10 Barb. 87.

<sup>3</sup> *Cooley v. Brainerd*, 38 Verm. 394.

<sup>4</sup> *Gardner v. Smith*, 7 Mich. 410; *Holden v. Rutland & Burlington R. Co.*, 30 Verm. 297; see *Clark v. Vermont &c. R. Co.*, 28 Id. 103.

<sup>5</sup> *Ohio & Miss. R. Co. v. Meissenheimer*, 27 Ill. 30; *Ohio &c. R. Co. v. Jones*, Id. 41.

<sup>6</sup> *Toledo &c. R. Co. v. Miller*, 45 Ill. 42.

&c., whether good-tempered, vicious, or unruly;<sup>1</sup> but it is not necessary that they should be strong enough to keep out an animal greatly frightened and excited.<sup>2</sup> The fences must be high enough to prevent horses or cattle from jumping over them, close enough to prevent sheep from clambering through them,<sup>3</sup> and sufficient to keep out all kinds of animals that would be kept from the track by an ordinary fence, without reference to the question whether they are large enough to throw a train off the track;<sup>4</sup> but fences need not be made so as to keep out dogs.<sup>5</sup> And a cattle-guard need not be sunk at the precise place where it would be most efficient, if great inconvenience would ensue therefrom to the working of the railroad.<sup>6</sup>

§ 459. These fences, gates, and cattle-guards must be not only erected but *maintained*. And, therefore, if an opening is made in the fence or cattle-guard, whether with or without the consent of the railroad company, and is allowed to remain an unreasonable length of time, the company is absolutely liable for injuries to cattle entering through the breach,<sup>7</sup> after it has had a reasonable time to

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<sup>1</sup> Chicago &c. R. Co. v. Uteley, 38 Ill. 410.

<sup>2</sup> *Ib.*

<sup>3</sup> Bessant v. Great Western R. Co., 8 C. B. [N. S.] 368. In that case, the plaintiff recovered for twenty-five sheep which had made their way through a small gap in the hedge. Martin, B., before whom the cause was tried, left it to the jury, upon these facts, to say whether the fence was sufficient; and this was held to have been a proper direction. Byles, J., added that he remembered a case in which a plaintiff had recovered and retained a verdict against a railway company, for a bull which had jumped over a fence six feet high.

<sup>4</sup> Indianapolis &c. R. Co. v. Marshall, 27 Ind. 300. A statute requiring railroad companies to maintain a sufficient fence on both sides of their property, without prescribing what a sufficient fence shall be, must be considered as referring to and adopting the general law fixing the standard of lawful fences (*Enright v. San Francisco &c. R. Co.*, 33 Cal. 230).

<sup>5</sup> *Wilson v. Wilmington &c. R. Co.*, 10 Rich. Law, 52.

<sup>6</sup> *Indianapolis &c. R. Co. v. Irish*, 26 Ind. 268.

<sup>7</sup> *McDowell v. N. Y. Central R. Co.*, 37 Barb. 195; *Munch v. N. Y. Central R. Co.*, 29 Barb. 647. In the first case, the breach had been suffered to remain for about

repair. Nor does it make any difference that no agent of the company was aware of the defect in the fence.<sup>1</sup> But we presume that a plaintiff could not recover in any such case if the breach was the result of his own act or neglect.<sup>2</sup> Where the breach is made by the railroad company itself, though for a necessary purpose (*e. g.*, to build a bridge), it is liable for cattle straying through at any time afterward.<sup>3</sup>

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two months. The plaintiff's cattle trespassed upon a neighbor's farm, and strayed thence upon the railroad through the breach thus left. Held, that the plaintiff could recover. The facts seemed to indicate that the opening was made by the defendant's servants, but no importance was attached to this. In the latter case, it clearly appeared that the breach was the act of a trespasser, and it had only been left open one or two weeks. There, also, the plaintiff recovered judgment. To the same effect, see *Brown v. Milwaukee &c. R. Co.*, 21 Wisc. 39; *Chicago &c. R. Co. v. Reid*, 24 Ill. 144; *Bartlett v. Dubuque &c. R. Co.*, 20 Iowa, 188. So, where a gap had been made by some one, but by whom it did not appear, it was held to be for the jury to determine whether the company was in fault for not repairing (*Indianapolis &c. R. Co. v. Snelling*, 16 Ind. 435).

<sup>1</sup> *Munch v. N. Y. Central R. Co.*, 29 Barb. 647. But compare *Toledo &c. R. Co. v. Fowler*, 22 Ind. 316.

<sup>2</sup> The gate constructed by a railroad company at one of the crossings having got out of repair, and liable to be blown open, the owner of the farm, without giving notice thereof to the company, took measures to secure the gate, which proved ineffectual. His cattle escaped through it, and were killed upon the railroad. There was evidence of some vigilance on the part of the company in searching for such defects, and that this escaped observation. Held, that whether the mode adopted for securing the gate was reasonably judicious, and whether the plaintiff was culpably negligent in suffering his cattle to remain in a field insufficiently fenced from the railroad, or in having failed to give notice to the company of the defect, were questions of fact, properly submitted to the jury (*Poler v. N. Y. Central R. Co.*, 16 N. Y. 476).

<sup>3</sup> *Indianapolis &c. R. Co. v. Logan*, 19 Ind. 294. The defendant, a railroad company, employed A. as a day laborer, and it was understood that if, after his hours of work, he saw any thing amiss, he should attend to it, and be paid for extra work. A., for his own purposes, took down the bars of a way across defendant's road, and omitted to replace them; in consequence of which the plaintiff's horses, escaping from their pasture upon the road, were killed by an engine of the defendant. Held, that it was part of A.'s duty, as a servant of the defendant, to put up the bars, and that the defendant was liable for the injury as a consequence of his neglect to do so (*Chapman v. N. Y. Central R. Co.*, 31 Barb. 399; affirmed, 33 N. Y. 369). In a suit against a railroad company for killing cattle upon its road, a complaint was held sufficient which alleged that the fence along the railroad took fire, and while burning, the servants of the defendant, to extinguish the fire, threw down the fence, making a gap therein, which was negligently left open by said servants, they seeing the plaintiff's cattle in a pasture adjacent, so that the cattle escaped upon the track, and were killed by the cars (*Indianapolis &c. R. Co. v. Truitt*, 24 Ind. 162).

Only reasonable or ordinary diligence is required of railroad companies in the maintenance of their fences. They are allowed a reasonable time for repairs, and are not bound to keep watch all night, for example, to guard against injuries to their fences.<sup>1</sup> If within such reasonable time the fence is repaired, the company is not liable under the statute for cattle entering through the breach.<sup>2</sup> If the fence is for the most part maintained, but is defective in particular places, the owner of injured cattle must give some proof that they entered at a defective part of the fence.<sup>3</sup>

§ 460. In Indiana, a railroad company is not bound to fence its road where its machine shop, car house, &c., are situated,<sup>4</sup> nor so as to prevent access to a mill built close to it.<sup>5</sup> But this is because the statute of that state only requires, in general terms, that railroads be "securely fenced," leaving the courts to determine how much fencing is needed to make them secure. No such exception is allowed in New York, the statute being differently worded, especially in respect to cattle-guards, which must be kept at *all* road-crossings, including those in the vicinity of railroad stations, although it might be more convenient for travelers if they were not kept there.<sup>6</sup> Of course

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<sup>1</sup> Illinois Central R. Co. v. Dickerson, 27 Ill. 55.

<sup>2</sup> Toledo &c. R. Co. v. Daniels, 21 Ind. 256; Indianapolis &c. R. Co. v. Truitt, 24 Id. 162; Toledo &c. R. Co. v. Fowler, 22 Id. 316; Illinois Central R. Co. v. Swearingen, 33 Ill. 289; see *Poler v. N. Y. Central R. Co.*, 16 N. Y. 476; *Murray v. N. Y. Central R. Co.*, 4 Keyes, 274.

<sup>3</sup> In an action against a railroad company for negligence in running over and killing a horse, where the injury is alleged to have occurred in consequence of a defect in a fence which the defendant was bound to maintain, if there is any evidence that the horse got upon the railroad track over or through a fence which the defendant was bound to maintain, it should be submitted to the jury; but not so of evidence that possibly the horse so got upon the track. If there is no evidence that the horse got on the track in the manner alleged, the plaintiff should be nonsuited (*Morrison v. N. Y. & New Haven R. Co.*, 32 Barb. 568).

<sup>4</sup> Indianapolis &c. R. Co. v. Oestel, 20 Ind. 231.

<sup>5</sup> Indianapolis &c. R. Co. v. Kinney, 8 Ind. 402.

<sup>6</sup> *Bradley v. Buffalo &c. R. Co.*, 34 N. Y. 427.

no fence ought to be built across a highway;<sup>1</sup> and although a highway has been practically abandoned for two years, yet, if it has not been legally surrendered by the proper authorities, a railroad company is not bound to put a fence across it.<sup>2</sup> But, under a statute requiring railroads to be "securely fenced," they must be fenced where they run beside highways.<sup>3</sup> A railroad company is not required, by a statute requiring it to fence against adjoining owners, to fence one part of its own land from another part thereof, even for the benefit of a person who is licensed by it, for a valuable consideration, to use either part of its land.<sup>4</sup> In Maine, railroads are not required to be fenced where they run through uninclosed and unimproved lands.<sup>5</sup> In the absence of an express statutory requirement of cattle-guards at private crossings, a railroad company is not bound to put them there.<sup>6</sup> And a provision requiring cattle-guards at "road-crossings" does not extend to farm-crossings or other private ways.<sup>7</sup> A railroad company is not excused from fencing on an embankment.<sup>8</sup>

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<sup>1</sup> This exception in the statute is to be implied (*Lafayette &c. R. Co. v. Shriner*, 6 Ind. 141).

<sup>2</sup> *Indiana Central R. Co. v. Gapen*, 10 Ind. 292. Compare *White Water &c. R. Co. v. Quick* (30 Ind. 384), in which it was held that the company must fence against the towpaths of an abandoned canal.

<sup>3</sup> *Indianapolis &c. R. Co. v. Guard*, 24 Ind. 222; *Indianapolis &c. R. Co. v. McKinney*, Id. 282.

<sup>4</sup> *Marfell v. South Wales R. Co.*, 8 C. B. [N. S.] 525; *Roberts v. Great Western R. Co.*, 4 Id. 506. But where a company, thus licensing the plaintiff to use a tramway, had erected gates to separate it from the railway, it was held to be a question for the jury whether an omission to close the gates on the approach of a train was negligence; and the jury finding that it was, the plaintiff was allowed to recover for two horses, which, being frightened by the approaching train, had run into its way through the open gates and been killed (*Marfell v. South Wales R. Co.*, 8 C. B. [N. S.] 525).

<sup>5</sup> The statute (1849, ch. 9, § 6) provides that "every railroad corporation shall erect and maintain substantial, legal, and sufficient fences on each side of the land taken by them for their railroad, where the same passes through inclosed or improved lands" (and see *Perkins v. Eastern R. Co.*, 29 Maine, 307).

<sup>6</sup> *Bartlett v. Dubuque &c. R. Co.*, 20 Iowa, 188.

<sup>7</sup> *Ib.*; and see *Brooks v. N. Y. & Erie R. Co.*, 13 Barb. 594.

<sup>8</sup> *Toledo &c. R. Co. v. Sweeney*, 41 Ill. 226.



§ 461. There can be no reason to doubt that none of the statutes requiring the maintenance of fences, gates or cattle-guards have any application to railroads running through the streets of large towns.<sup>1</sup> Such obstructions would be intolerable. But cattle-guards must be maintained at the crossings of village streets, where they can be placed upon land belonging to the railroad,<sup>2</sup> though not where a railroad running along a street is crossed by another street, and the passage of either street would be necessarily impeded by cattle-guards.<sup>3</sup>

§ 462. A railroad company is liable, under the statute, only for animals entering upon the line at a place which the company is bound to fence.<sup>4</sup> The fact that the fences are defective is immaterial, if the animal injured entered at another place.<sup>5</sup> So the neglect of a railroad company to build a fence does not exonerate the plaintiff from the obligation to take ordinary care for the protection of his animals, where the fence, if built, would not have been sufficient to close access to the track. If the plaintiff's

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<sup>1</sup> *Bowman v. Troy & Boston R. Co.*, 37 Barb. 516; see *Illinois Central R. Co. v. Goodwin*, 30 Ill. 117; *Illinois Central R. Co. v. Phelps*, 29 Id. 447; *Vanderkar v. Rensselaer &c. R. Co.*, 13 Barb. 390; *Parker v. Rensselaer &c. R. Co.*, 16 Barb. 315; *Halloran v. N. Y. & Harlem R. Co.*, 2 E. D. Smith, 257.

<sup>2</sup> *Brace v. N. Y. Central R. Co.*, 27 N. Y. 269.

<sup>3</sup> See *Brace v. N. Y. Central R. Co.*, 27 N. Y. 269, 277; *Halloran v. N. Y. & Harlem R. Co.*, 2 E. D. Smith, 257; *Perkins v. Eastern R. Co.*, 29 Maine, 307.

<sup>4</sup> *Great Western R. Co. v. Morthland*, 30 Ill. 468; *Perkins v. Eastern R. Co.*, 29 Maine, 307; see *Illinois Central R. Co. v. Williams*, 27 Ill. 48; *Ohio & Miss. R. Co. v. Irwin*, Id. 178.

<sup>5</sup> *Brooks v. N. Y. & Erie R. Co.*, 13 Barb. 594; *Great Western R. Co. v. Morthland*, 30 Ill. 458; *Galena & Chicago R. Co. v. Griffin*, 31 Ill. 303; *St. Louis &c. R. Co. v. Linder*, 39 Ill. 433; *Bennett v. Chicago &c. R. Co.*, 19 Wisc. 145. Where an animal, permitted by its owner to run at large upon commons adjoining the depot grounds of a railroad company, escapes from such grounds upon the railroad track, the company is not liable for injuries done to such animal by one of its trains, unless the injury is inflicted willfully, or through the gross negligence of the company's servants (*Bennett v. Chicago &c. R. Co.*, 19 Wisc. 145). If the animal got on the track at a highway crossing, a defect in the fence is immaterial (*Logansport &c. R. Co. v. Caldwell*, 38 Ill. 280).

negligence was the direct and proximate cause of the injury, the defendant should have the benefit of that fact, notwithstanding its neglect, since its care would not have sufficed to prevent the injury from occurring.<sup>1</sup>

§ 463. Where a railroad company has a valid contract with the owner of adjoining land, by which the latter agrees to erect and maintain the fence required by law, this agreement has generally been held a good defense for that company against any claim of such land-owner,<sup>2</sup> or of a grantee<sup>3</sup> or tenant<sup>4</sup> of such land under him, founded upon the statute.<sup>5</sup> And even if the fence is destroyed by the

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<sup>1</sup> Joliet &c. R. Co. v. Jones, 20 Ill. 221.

<sup>2</sup> Talmadge v. Rensselaer &c. R. Co., 13 Barb. 493; Terre Haute &c. R. Co. v. Smith, 16 Ind. 102; Indianapolis &c. R. Co. v. Petty, 25 Ind. 413. But where commissioners assessed the damages done to a land-owner by the construction of a railroad, and a separate sum for building fences, and judgment was rendered in his favor for both sums, but the payment resisted by a proceeding in chancery on the part of the company, which, while this was still undecided, commenced running its engines, and the cattle of the occupier of the land strayed upon the track, and were killed by the engines, held, that the obligation to maintain the fence rested primarily upon the company; and that until it had either built the fences, or paid the land-owner for doing it, and he had had sufficient time to do it, the mere fact that cattle had strayed upon the road from the land adjoining was no ground for imputing negligence to the owner (Quimby v. Vermont Central R. Co., 23 Verm. 387). In an action against a railroad company, under the statute, for killing stock, the declaration must negative all the exceptions in the statute; but the burden of proof is not upon the plaintiff to prove the averment that there was no contract between the company and the owner of the ground that the latter should build the fence where the accident occurred (Great Western R. Co. v. Bacon, 30 Ill. 347).

<sup>3</sup> Terry v. N. Y. Central R. Co., 22 Barb. 574; Easter v. Little Miami R. Co., 14 Ohio St. 48; see Stearns v. Old Colony R. Co., 1 Allen, 493; McCool v. Galena & Chicago Union R. Co., 17 Iowa, 461. But a mere verbal waiver of the duty to fence does not bind the grantee (St. Louis &c. R. Co. v. Todd, 36 Ill. 409).

<sup>4</sup> Tombs v. Rochester &c. R. Co., 18 Barb. 583; Duffy v. N. Y. & Harlem R. Co., 2 Hilt. 496; Cincinnati, H. & D. R. Co. v. Waterson, 4 Ohio St. 424; Indianapolis &c. R. Co. v. Petty, 25 Ind. 413.

<sup>5</sup> Much doubt is thrown upon all these decisions by the observations of Peckham, J., in a later case in the Court of Appeals, in which he strongly intimates that railroad companies cannot thus evade their liabilities, but must repair the fences, and content themselves with recovering the expense from the land-owner (Shepard v. Buffalo &c. R. Co., 35 N. Y. 641).

culpable negligence of the railroad company, this does not revive its statutory liability to the adjoining occupant. His remedy is by an action for the value of the fence thus destroyed, which it is his duty to replace. He is not at liberty to leave the fence out of repair, and then to hold the company responsible for all the damage that may ensue.<sup>1</sup> But no agreement or act of a land-owner in relation to fences is a defense to an action brought by a third person, not claiming under such land-owner.<sup>2</sup> Nor is any such agreement a defense to any other company than the one with which it was made, or to which it has been transferred.<sup>3</sup> The company will not escape responsibility under the statute by merely employing an adjoining land-owner to *build* the fence.<sup>4</sup> The entire duty of its *maintenance* must be cast upon him by the contract, in order to have the effect of relieving the company from liability to him, except indeed so far as the injury of which he complains is the immediate result of his own failure to comply with the terms of his contract. Thus if, being employed to construct a fence, the land-owner left a gap in it, through which his cattle walked upon the track, he should not be allowed to recover for their loss; but if he made the fence so badly that it fell down the next day, the company should be held responsible for its non-repair within a reasonable time, just as in case of a breach in the fence from any other cause.

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<sup>1</sup> Where, under the conditions on which the company acquired their title to the land, the adjoining owner was bound to maintain fences: held, that after the fences had been burned by sparks from the locomotive, the company were not under such an obligation to rebuild as to be liable to him for injuries to cattle which escaped on to the track (*Terry v. N. Y. Central R. Co.*, 22 Barb. 574).

<sup>2</sup> *Corwin v. N. Y. & Erie R. Co.*, 13 N. Y. 42; see *New Albany &c. R. Co. v. Maiden*, 12 Ind. 10.

<sup>3</sup> *Shepard v. Buffalo &c. R. Co.*, 35 N. Y. 641.

<sup>4</sup> *Illinois Central R. Co. v. Swearingen*, 33 Ill. 289; *Norris v. Androscoggin R. Co.*, 39 Maine, 273.

§ 464. In Massachusetts, the owner of land adjoining a railroad cannot recover against the railroad company, under the statute, if either he, or any person under whom he claims title, sold to the company the land upon which the track is laid, prior to the passage of the act of 1846, because the person thus selling received in the price compensation for all the disadvantages of the road, including the dangers arising from want of fences.<sup>1</sup>

§ 465. A mere contract to fence, entered into by a railroad company, does not have the same effect as the statutes to which we have thus far referred. The railroad company, under such a contract, is not liable for injuries suffered by cattle, where its servants have not been negligent in any other respect than in the mere omission to maintain the fence.<sup>2</sup> The utmost consequence of that neglect is to give a tacit permission for the entry of the cattle upon the road, and to make it the duty of the company to manage its trains and business generally in such manner as ordinary care would require where cattle may lawfully wander up and down the road. Neither is the company liable if the owner of the cattle proximately contributed to the injury by his fault,<sup>3</sup> otherwise than by

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<sup>1</sup> *Stearns v. Old Colony R. Co.*, 1 Allen, 498. In *Milliman v. Oswego &c. R. Co.* (10 Barb. 87), it was held that the New York statute did not extend so far as to give a remedy to adjoining owners against companies organized before its enactment, which had paid such owners' damages in which the expense of fences, gates, &c., had been included. In *Marsh v. N. Y. & Erie R. Co.* (14 Barb. 364), the same view was adopted by Brown, J., but opposed by Strong, J., and the cause was decided upon another point. It is at least certain that such a defense is good only against an *adjoining* owner. *Corwin v. N. Y. & Erie R. Co.* (13 N. Y. 42) shows this. That was an action against a company organized long before the statute of fences was passed. This point was not raised, because the plaintiff was not an adjoining owner; but the case was argued for the defendant by one of the ablest lawyers in the state, who would not have failed to make this point, if there had been any thing in it. There was, moreover, in that case, a positive agreement on the part of the adjoining owner to maintain the fences. And this defense, which is much stronger than the mere fact that such owner was paid the cost of a fence, was held to be of no avail.

<sup>2</sup> *Drake v. Phil. & Erie R. Co.*, 51 Penn. St. 240.

<sup>3</sup> *Ib.*; *Joliet & Northern Ind. R. Co. v. Jones*, 20 Ill. 221.

merely allowing them to stray upon the track. In Pennsylvania, it is further held that, by allowing his cattle to stray upon the track, the owner deprives himself of a right of action under the contract, or, in effect, that the measure of damages for the breach of such a contract is the cost of replacing the fence, and that such breach gives no license for the entry of cattle upon the road.<sup>1</sup> In Iowa, the opposite doctrine is established, and a railroad company is liable to a person, with whom it has made such a contract, for damage done to his animals, by the negligent management of the trains or tracks, if the injured animals stray upon the road in consequence of the failure of the company to keep such a fence as it had agreed to maintain.<sup>2</sup> We are of opinion that this latter doctrine is correct. The object of the contract for a fence is clearly to keep cattle off the track; and the railroad company having undertaken to effect this, the person with whom such a contract is made has a right to presume that the company has performed its duty, and may properly allow his cattle to run at large in any place from which they cannot stray upon the railroad, so long as the fence is maintained. If, indeed, their owner has actual or constructive notice of a defect in the fence, he ought to use ordinary care to prevent the cattle from passing through it, and should not recover for damage suffered by him which might have been avoided by the use of such care. His remedy in such case would be to recover for the expense and trouble to which he was put in taking the necessary precautions to keep his cattle from straying upon the road. An agreement between the company and an adjoining owner, by which the former binds itself to erect a part of the fences and guards required by statute, does not waive the right of the latter to the full benefit of

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<sup>1</sup> *Drake v. Philadelphia & Erie R. Co.*, 51 Penn. St. 240.

<sup>2</sup> *Fernon v. Dubuque & Southwestern R. Co.*, 22 Iowa, 528.

the statute.<sup>1</sup> In Massachusetts, it has been held that an agreement by a railroad company to fence cannot be enforced against it by a subsequent purchaser of the land.<sup>2</sup> In New York, the statute of 1854 provides a remedy against the grantees of a person agreeing to fence, but does not cover this case.<sup>3</sup> The question is one belonging to real estate law, rather than to the law of negligence; and we shall not, therefore, pursue it further. It may be well to add that no contract upon the subject of fences is implied from a mere grant of the right of way to a railroad company.<sup>4</sup>

§ 466. When a railroad company runs its trains over a track belonging to another company, and such track is not properly fenced, a nice question arises as to which company, if either, is liable under the statute for injuries committed by the trains of the former company. We think that the negligence of the company owning the track is to be imputed to the company running the trains, and that the latter is absolutely liable, under the statute, for injuries to animals.<sup>5</sup> In Illinois, both companies are held responsible.<sup>6</sup>

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<sup>1</sup> *Poler v. N. Y. Central R. Co.*, 16 N. Y. 476; *Shepard v. Buffalo &c. R. Co.*, 35 N. Y. 641; see *White v. Concord R. Co.*, 10 Foster, 188.

<sup>2</sup> *Morse v. Boston & Maine R. Co.*, 2 Cush. 536.

<sup>3</sup> Stat. 1854, ch. 282.

<sup>4</sup> A mere grant by a land-owner, of a right of way, does not impose the obligation of fencing upon either party; and the company is not responsible for the destruction of cattle in the field, unless it is shown that it was caused by the wanton and reckless negligence of its agents (*Louisville & Frankfort R. Co. v. Milton*, 14 B. Monr. 75).

<sup>5</sup> *Illinois Central R. Co. v. Kanouse*, 39 Ill. 272; *Labussiere v. New Haven R. Co.*, 10 Abb. Pr. 398. To the contrary, see *Whitney v. Atlantic &c. R. Co.*, 44 Maine, 362; *Wyman v. Penobscot &c. R. Co.*, 46 Maine, 162; *Parker v. Rensselaer &c. Co.*, 16 Barb. 315. It has been since settled in New York, that if the company owning the track never runs trains upon it, another company running trains thereon is liable for injuries done by such trains through the want of a fence (*Tracy v. Troy & Boston R. Co.*, 38 N. Y. 433); and this seems to us decisive of the whole question in accordance with the text.

<sup>6</sup> *Toledo &c. R. Co. v. Rumbold*, 40 Ill. 143.

§ 467. A recent statute of New York makes the lessees of railroads liable, equally with the corporations owning the tracks, for the want of fences.<sup>1</sup> And the same rule has been established in Vermont and Wisconsin by judicial construction.<sup>2</sup> The railroad company itself will remain liable under the statute, notwithstanding it has leased the road, if it retains control over the running of the trains, or if the statute authorizing the lease provided that it should not exonerate the lessor from any obligation imposed upon it by law. In Iowa, it is held that lessees are not responsible for the want of a fence.<sup>3</sup>

§ 468. The statute of Michigan, like that of New York, makes agents of railroad companies, as well as the companies themselves, responsible for injuries to cattle while the road is unfenced. Under this provision, it is held that a contractor having charge of the route, for the purpose of building the road, is an agent of the company,

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<sup>1</sup> N. Y. Stat. 1864, ch. 582, § 2; which is as follows: "And when the railroad of any corporation shall be leased to any other railroad company, or to any person or persons, such lessees shall maintain fences on the sides of the road so leased, of the height and strength of a division fence, as required by law, with openings or gates, or bars therein, at the farm-crossings of such railroad, for the use of the proprietors of the lands adjoining such railroads, and shall also construct, where the same has not already been done, and hereafter maintain cattle-guards at all road-crossings, suitable and sufficient to prevent horses, cattle, sheep, and hogs from getting on to such railroad. And so long as such fences and cattle-guards shall not be made, and when not in good repair, such lessees and their agents shall be liable for damages which shall be done by the agents or engineers of any such corporation, to any cattle, horses, sheep, or hogs thereon; and when such fences and guards shall have been duly made, and shall be kept in good repair, such lessee shall not be liable for any such damages, unless negligently or willfully done. A sufficient post and wire fence, of requisite height, shall be deemed a lawful fence, within the provisions of this section; but no lessees of a railroad corporation shall be required to fence the sides of said roads, except when such fence is necessary to prevent horses, cattle, sheep, and hogs from getting on to the track of the railroad, from the lands adjoining the same."

<sup>2</sup> *Clement v. Canfield*, 28 Verm. 302; *McCall v. Chamberlain*, 13 Wisc. 637; *Wyman v. Penobscot & Kennebec R. Co.*, 46 Maine, 162; *Whitney v. Atlantic &c. R. Co.*, 44 Maine, 362.

<sup>3</sup> *Liddle v. Keokuk &c. R. Co.*, 23 Iowa, 378.

and liable for cattle lost by his neglect to make fences along the road, upon taking possession of the route.<sup>1</sup> An engineer in charge of the train by which cattle are injured, is undoubtedly within this provision.<sup>2</sup> But we have no doubt that only those agents who are actually concerned in producing the injury are liable under such a statute. It cannot be so construed as to hold an engineer on one train responsible for an injury inflicted by another train.

§ 469. The statutes concerning fences are enacted for the benefit of the owners of animals escaping upon the track, and not for the protection of passengers in the railroad trains, or of the servants of a railroad company employed on such trains. Therefore, in an action by any such person against a railroad company, upon an injury caused by cattle coming out upon an unfenced portion of the road, these statutes cannot be referred to as any test or measure of the company's obligation, or as any evidence of its negligence.<sup>3</sup> The benefit of the American statutes is generally not confined to owners or occupants of land immediately adjoining a railroad, but extends to all owners of animals;<sup>4</sup> though in Vermont and New Hamp-

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<sup>1</sup> *Gardner v. Smith*, 7 Mich. 410.

<sup>2</sup> Under a statute which declares a railway corporation and its agents liable for all damages which shall be done by its agents or engines, to cattle, &c., before the erection of division fences and cattle-guards, an engineer, and a fireman who was the servant of the engineer, may be chargeable severally, or jointly with the corporation (*Suydam v. Moore*, 8 Barb. 358. And see *Corwin v. N. Y. & Erie R. Co.*, 13 N. Y. 42).

<sup>3</sup> So held as to the servant of a railroad company (*Langlois v. Buffalo &c. R. Co.*, 19 Barb. 364). The principle of this decision clearly extends to passengers. And so it has been adjudged in relation to passengers (*Buxton v. Northeastern R. Co.*, Law Rep. 3 Q. B. 549). In *Dean v. Sullivan R. Co.* (2 Foster, 316), Bell, J., intimated an opinion that, by analogy to the principle upon which the proprietors of roads and bridges are bound to provide safeguards for dangerous places, a railroad company may be bound to provide such fences as would prevent any danger to travelers from animals escaping upon the track. And so it has been since adjudged (*Lackawanna &c. R. Co. v. Cheneweth*, 52 Penn. St. 382).

<sup>4</sup> *Corwin v. N. Y. & Erie R. Co.*, 13 N. Y. 42; *New Albany &c. R. Co. v. Aston*, 13



shire, under peculiar statutes, it is held that the owner of cattle which are unlawfully on the land adjoining a railroad, cannot recover under the statute for injuries suffered by reason of their escape through a defective fence upon the road.<sup>1</sup> In England and Massachusetts the statutes are confined to the benefit of adjoining owners or occupiers.<sup>2</sup> And, therefore, while the negligence of the adjoining owner in permitting his cattle to stray upon a highway crossing the road, is no defense to his action,<sup>3</sup> a railroad company is not liable to any one for a failure to fence out cattle straying upon a highway running next to and *parallel* with the railroad.<sup>4</sup> The same rule prevails in New Hampshire.<sup>5</sup> But the company is bound to fence out cattle *lawfully* upon the highway.<sup>6</sup> Under the English statute, which requires railway companies to keep a gate closed where the road crosses a highway, they are liable, if they leave the gate open, for cattle killed by getting on the track in conse-

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Ind. 545; New Albany &c. R. Co. v. Bishop, Id. 586; Indianapolis &c. R. Co. v. Meek, 10 Ind. 502; Indianapolis &c. R. Co. v. Townsend, Id. 38; Brown v. Providence, Hartford &c. R. Co., 12 Gray, 55.

<sup>1</sup> Jackson v. Rutland &c. R. Co., 25 Verm. 150; Morse v. Rutland &c. R. Co., 27 Id. 49; Mayberry v. Concord R. Co., 47 N. H. 391; Cornwall v. Sullivan R. Co., 8 Foster, 161. In the last case, the railroad company itself owned a piece of land adjoining the track, which was not fenced either from the track, or from the plaintiff's land on the other side. The plaintiff's cattle strayed through the company's land upon the track, where they were killed. It was held that the plaintiff could not recover for their loss. This decision was made under a peculiar statute. The Vermont decisions were made under a special charter, simply requiring the railroad to maintain a sufficient fence.

<sup>2</sup> Ricketts v. East India Docks &c. R. Co., 12 C. B. 160; Eames v. Salem & Lowell R. Co., 98 Mass. 560.

<sup>3</sup> Fawcett v. York & North Midland R. Co., 16 Q. B. 610.

<sup>4</sup> Manchester &c. R. Co. v. Wallis, 14 C. B. 213.

<sup>5</sup> Towns v. Cheshire R. Co., 1 Foster, 363.

<sup>6</sup> Therefore, where a colt, while driven along a highway by the owner's servant, escaped upon a railroad through a gate negligently left open by the company's servants, and was killed by a passing train, the company was held responsible (Midland R. Co. v. Daykin, 17 C. B. 126).

quence, without reference to whether such cattle were, as between their owners and the public, lawfully on the highway.<sup>1</sup>

§ 470. After a proper fence has been erected, it is the duty of every person interested in its maintenance to make reasonable efforts to give notice to the railroad company of any defects in it which may come under his actual notice; and if he fails to do so, he cannot recover any damage which he may sustain by reason of such defect,<sup>2</sup> if it was not known to some agent of the company whose duty it was to communicate information of the fact to the officers having charge of such matters.<sup>3</sup>

§ 471. These statutes are not to be so literally construed as to enable one who *willfully* turns his cattle upon a railroad, to recover for injuries suffered by them.<sup>4</sup>

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<sup>1</sup> Fawcett v. York & North Midland R. Co., 16 Q. B. 610.

<sup>2</sup> In Poler v. N. Y. Central R. Co. (16 N. Y. 476), Selden, J., says: "There is no doubt that although the statute imposes upon the railroad company the absolute duty of maintaining fences, gates, &c., yet a duty in this respect also devolves upon the proprietors along the road. They have no right quietly to fold their arms and voluntarily to permit their cattle to stray upon the railroad track, through the known insufficiency of the fences which the corporation are bound to maintain. As it would be impracticable for the railroad company to keep a constant watch of every gate and every rod of fence along the line of its road, it is but reasonable to require of the proprietors, when defects have actually come to their knowledge, to make suitable efforts to apprise the company of such defects. In enforcing this rule, however, upon proprietors, care should be taken not to exempt the company, upon which the primary duty rests, from its due share of responsibility. It will be found impossible to define with precision the relative obligation of the parties in this respect, and it must result in most cases in a question to be addressed to the sound discretion of a jury." In that case, however, it was held that the plaintiff was not in fault in this respect, and the cause was really decided upon another point.

<sup>3</sup> In an action for an injury arising from a defect in a railroad fence, an instruction to the jury that the mere fact that hands working in a gravel pit for the company had notice of the defect, would not bind the company, but that notice, to be binding, must be proved to have come to some person or agent connected with the keeping or repair of fences, was held to be properly refused (Indianapolis &c. R. Co. v. Truitt, 24 Ind. 162).

<sup>4</sup> See Corwin v. N. Y. & Erie R. Co., 13 N. Y. 42, 49, per Marvin, J.; Brooks v.

This would be offering a reward for cruelty. So, if cattle are allowed to stray upon premises adjoining a railroad properly fenced, and the owner of the land carelessly opens a gate leading to the railroad, through which the cattle stray upon the track, the owner of the cattle cannot recover for injuries suffered by them while thus upon the track,<sup>1</sup> except as hereafter stated. But, as a general proposition, the contributory negligence of the plaintiff is no defense to an action under the statute, the want of a proper fence being proved.<sup>2</sup> The owner of cattle is not deprived of the benefit of the statute, by his turning cattle into a field of his own, adjoining the railroad, although he knows it to be unfenced.<sup>3</sup> He is not bound to forego the use of his property in consequence of the company's negligence. Where, however, the fence is carried

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N. Y. & Erie R. Co., 13 Barb. 594, per Shankland, J.; *Shepard v. Buffalo &c. R. Co.*, 35 N. Y. 641, per Peckham, J.

<sup>1</sup> *Indianapolis &c. R. Co. v. Shimer*, 17 Ind. 295; *Ellis v. London & Southwestern R. Co.*, 2 Hurlst. & N. 424. In the last case, the railroad company had put up gates with locks, and furnished the plaintiff with a key, which he lost, and his servants afterward fastened the gates with bits of wood, which were taken out by some stranger, and the gates left open. Some colts of the plaintiff strayed through, and were killed by a passing train. It was held to be a question for the jury whether the plaintiff was not a contributor to his own injury, and they having found for the defendant on that issue, the court sustained the verdict. And see *Illinois Central R. Co. v. McKee*, 43 Ill. 119.

<sup>2</sup> *Ante*, § 456.

<sup>3</sup> *Shepard v. Buffalo &c. R. Co.*, 35 N. Y. 641; *Jeffersonville &c. R. Co. v. Nichols*, 30 Ind. 321; *Gardner v. Smith*, 7 Mich. 410. In Vermont, however, it has been held that where (as is the case in that state) the law requires owners of cattle to keep them inclosed, and railroad companies to fence their lines, if the owner, knowing a railway to be unfenced, permits his cattle to run in the highway, knowing that there is no obstruction to their passing from thence upon the railroad track, he is guilty of the same degree of negligence as that with which the corporation is chargeable, in permitting its railroad to remain thus exposed, and he cannot recover if it appear that the company was not negligent in the management of the train at the time of the injury (*Trow v. Vermont Central R. Co.*, 24 Verm. 487). And in Indiana, the owner of a blind horse having turned it loose upon a common adjoining the unfenced track of a railroad, it was held that he could not recover for damage done to the horse by a passing train (*Knight v. Toledo & Wabash R. Co.*, 24 Ind. 402). So held, also, where the owner turned out his horses with blind-bridles on (*St. Louis &c. R. Co. v. Todd*, 36 Ill. 409).

away by a cause beyond the control of the company, one who leaves his cattle in the adjoining field, either after the actual destruction of the fence, and before the company has had reasonable time to repair it, or after it is manifest to a reasonable man that it will be thus destroyed,<sup>1</sup> cannot recover for cattle straying from the field upon the track. The fact that the plaintiff was employed by the company to build the fence which has proved defective, is no defense.<sup>2</sup> But if the owner of the adjoining land has refused to permit the company to erect fences bordering on his land, this is a good defense for the company as to him, his grantee or tenant, against any claim founded upon such defect of fence.<sup>3</sup>

§ 472. Where the fences and guards required by law are maintained by a railroad company, its *absolute* liability (under these statutes) ceases, and it is thenceforward only liable for its negligence or willful fault, subject to the same rules as any other party guilty of negligence.<sup>4</sup> The company is liable in such case for injuries to animals upon the track which could have been avoided by the use of ordinary care, after its servants knew, or ought to have known, of the presence of the animals,<sup>5</sup> but not

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<sup>1</sup> *Indianapolis &c. R. Co. v. Wright*, 13 Ind. 213. In that case the plaintiff knew that the fence was likely to be carried off by a flood, but refused to turn his cattle out of the field. In the night the fence was thus carried away; and the cattle, straying upon the track, were killed by an engine of the defendant. Held, that the plaintiff could not recover.

<sup>2</sup> *Norris v. Androscoggin R. Co.*, 39 Maine, 273; *Illinois Central R. Co. v. Swearingen*, 33 Ill. 289. But where a bar was placed in a particular manner at the request of the owner of cattle, which escaped upon the track in consequence of an error in the mode of placing the bar, it was held that he could not recover (*Enright v. San Francisco &c. R. Co.*, 33 Cal. 230).

<sup>3</sup> *Tombs v. Rochester &c. R. Co.*, 18 Barb. 583; *Hurd v. Rutland &c. R. Co.*, 25 Verm. 116.

<sup>4</sup> *Hance v. Cayuga & Susquehanna R. Co.*, 26 N. Y. 428; *Chicago &c. R. Co. v. Cauffman*, 28 Ill. 513; *Toledo & Wabash R. Co. v. Thomas*, 18 Ind. 215; *Northern Indiana R. Co. v. Martin*, 10 Id. 460.

<sup>5</sup> *Illinois Central R. Co. v. Middlesworth*, 46 Ill. 495; *New Albany &c. R. Co. v.*

otherwise.<sup>1</sup> If a fence or cattle-guard is so covered by snow or earth as to enable animals to pass over it, the company is liable upon proof of its negligence in leaving the fence in that state,<sup>2</sup> but not otherwise, nor even then, if the plaintiff's fault contributed to the injury in the manner heretofore defined.<sup>3</sup> Neither is a railroad company liable for an injury to animals, occasioned by their getting upon the track through a gate left open without the fault of the company, at a part of the road properly fenced and guarded, although another portion of the road is not fenced.<sup>4</sup> The company is only required to use reasonable diligence to keep its gates closed.<sup>5</sup> When a railroad company exercises due care and diligence in maintaining the fences and gates which it is required by law to maintain for the protection of cattle, an adjoining proprietor is liable to third persons for any injury to stock belonging to them, resulting from his own willful act, in leaving open a gate through which such stock passed upon the track.<sup>6</sup>

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McNamara, 11 Ind. 543; Central R. Co. v. Davis, 19 Geo. 437; Isbell v. N. Y. & New Haven R. Co., 27 Conn. 393; and see *ante*, §§ 25, 36, 454.

<sup>1</sup> Fisher v. Farmers' Loan & Co., 21 Wisc. 73.

<sup>2</sup> A railroad company is bound at all times to keep its cattle-guards open and unobstructed; and if it permits them to remain filled with snow, so that cattle on the highway, without any negligence on the part of the owner, pass over them to the track, and are injured by its cars, it is guilty of negligence, and liable for the damage (Dunnigan v. Chicago & Northwestern R. Co., 18 Wisc. 28).

<sup>3</sup> Hance v. Cayuga & C. R. Co., 26 N. Y. 428. In that case, the defendant had erected proper fences and guards, but they were filled up with snow, which the defendant was not sufficiently diligent in removing. The plaintiff's cow passed over a cattle-guard, and was killed by a passing train. The plaintiffs having been in fault in allowing the cow to escape from their yard, held, that they could not recover. Balcom, J., who delivered the opinion of the court, thought, however, that "if the plaintiffs had been properly driving their cow along the highway, and she had walked over or through the cattle-guard on to the railroad track by reason of the omission of the defendant to remove the snow," they would have been entitled to recover.

<sup>4</sup> Brooks v. N. Y. & Erie R. Co., 13 Barb. 594.

<sup>5</sup> Illinois Central R. Co. v. McKee, 43 Ill. 119; Illinois Central R. Co. v. Dickerson, 27 Ill. 55; see Poler v. N. Y. Central R. Co., 16 N. Y. 476.

<sup>6</sup> Russell v. Hanley, 20 Iowa, 219.

If the company opens a private way for the accommodation of an adjacent owner, he and his tenants must keep up the bars, at their own risk.<sup>1</sup> And if they fail to do so, the owner of the land next beyond cannot recover for cattle trespassing on their land, and so straying upon the railroad.<sup>2</sup>

§ 473. In Maryland and Georgia, under somewhat similar statutes, it is held that railroad companies are not absolutely liable for animals straying upon their roads through want of fences, that the only effect of the statute is to raise a presumption of negligence against them if they are not fenced; and the owner of an animal cannot, in those states, recover for injuries to it, if the railroad company disproves negligence on its own part, or proves contributory negligence on his.<sup>3</sup>

§ 474. In Ohio, Iowa, California, Mississippi, and South Carolina, independent of any statute (inasmuch as by the common law of those states cattle may run at large), a railroad company is liable for injuries to cattle while straying upon their tracks, if caused by want of ordinary care on the part of the company,<sup>4</sup> unless the rail-

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<sup>1</sup> Indianapolis &c. R. Co. v. Shimer, 17 Ind. 295.

<sup>2</sup> Indianapolis &c. R. Co. v. Adkins, 23 Ind. 340.

<sup>3</sup> See Keech v. Baltimore & Ohio R. Co., 17 Md. 32; Baltimore & Ohio R. Co. v. Lamborn, 12 Md. 257; Macon &c. R. Co. v. Davis, 13 Geo. 68.

<sup>4</sup> Kerwhacker v. Cleveland &c. R. Co., 3 Ohio St. 172; Cleveland &c. R. Co. v. Elliott, 4 Ohio St. 474; Alger v. Mississippi &c. R. Co., 10 Iowa, 268; Richmond v. Sacramento &c. R. Co., 18 Cal. 351; Vicksburg &c. R. Co. v. Patton, 31 Miss. 156; Murray v. South Carolina R. Co., 10 Rich. Law, 227. A train of cars, being behind time, was going at an unusual rate of speed in the night-time, when it ran over the plaintiff's cattle, which, in consequence of there being no fence about the track, had strayed upon it. Held, that the railroad company was not guilty of negligence, and, therefore, that it was not liable (Central Ohio R. Co. v. Lawrence, 13 Ohio St. 66). In that case, Gholson, J., said: "A railroad company, like any other land proprietor, has a right to the free, exclusive, and unmolested use of its railroad track, not exempt however from the duty of so using its own property as to do no unneces-

road is fenced, in which case it is said that the company will be liable only for gross negligence,<sup>1</sup> meaning, we suppose, for the want of ordinary care on the part of its agents after they have become, or ought to have become, aware of the presence of cattle upon the track, but not for failing to take such precautions as would have been proper where the company had reason to anticipate their presence. A railroad company may protect itself against such liabilities by procuring a contract from adjoining owners for the maintenance by the latter of the necessary fences, which will be a good defense to any claims of the parties so contracting, their grantees, and tenants,<sup>2</sup> for damage done to animals straying upon the track, otherwise than by want of ordinary care to avoid injury after becoming aware of their presence.

§ 475. Where the charter of a railroad company binds it to fence if the adjoining owners request it to do so, but not otherwise, the company is not liable for cattle straying upon its track, owned by a person who agreed that it should not fence.<sup>3</sup>

§ 476. In Ireland, railway companies are permitted to construct their works under the direction of a public arbitrator, appointed in a manner prescribed by the Railways Act (Ireland), 1851, and when they have complied with his directions, no one can object in a collateral proceeding (such as an action to recover the value of cattle injured upon the road) that the fences, gates, &c., thus erected were insufficient.<sup>4</sup>

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sary injury to another, and bound, when using its property in a mode which may result in injury to another, to use due care."

<sup>1</sup> See *Alger v. Mississippi &c. R. Co.*, 10 Iowa, 268.

<sup>2</sup> *Cincinnati &c. R. Co. v. Waterson*, 4 Ohio St. 424; and see *ante*, § 463.

<sup>3</sup> *Tower v. Providence &c. R. Co.*, 2 R. I. 404.

<sup>4</sup> *Lockhart v. Irish Northwestern R. Co.*, 14 Irish C. L. 385.

## CHAPTER XXVII.

### GENERAL MANAGEMENT OF RAILROADS.\*

- SEC. 477. Ordinary care required to avoid injury to persons, &c., on the track.
- 478. Rate of speed.
  - 479. Injuries to cattle.
  - 480. Care required of railroads on highways.
  - 481. Care required at highway crossings.
  - 482. Care required at other crossings.
  - 483. Flagmen and watchmen.
  - 484. Neglect of precautions required by statute or ordinances.
  - 485. Omission to ring bell at crossings.
  - 485 a. Injuries to cattle by omission to ring bell.
  - 486. Fright of animals by noise.
  - 487. Contributory negligence.
  - 488. Negligence in crossing railroad.
  - 489. Crossing in view of train.
  - 490. Crossing between cars.
  - 491. Traveling on the track.
  - 492. When animal is lawfully on the track.
  - 493. Negligence subsequent to contributory negligence.
  - 494. Conflict of duty in cases of contributory negligence.

§ 477. A railroad company is bound to use ordinary care and caution to avoid injuring persons or property which may be upon its track. It is not bound to use more than ordinary care for this purpose;<sup>1</sup> but “ordinary care,” with reference to the management of a railroad, must not be understood as meaning no other degree of care than would be required of the driver of a stage-coach.<sup>2</sup> The managers of a railroad must take that degree of care which

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\* This chapter relates mainly to railroads operated by steam. Horse railroads are treated of in section 312.

<sup>1</sup> *Brand v. Schenectady &c. R. Co.*, 8 Barb. 368; *Coy v. Utica &c. R. Co.*, 23 Barb. 643, 651; *Cleveland &c. R. Co. v. Terry*, 8 Ohio St. 570; *Pendleton St. R. Co. v. Shires*, 18 Ohio St. 255; *Baltimore &c. R. Co. v. Buhra*, 28 Md. 647. As to the care which should be taken to prevent the explosion of a locomotive, see *Chicago &c. R. Co. v. Shannon*, 43 Ill. 339.

<sup>2</sup> *Johnson v. Hudson River R. Co.*, 6 Duer, 633; affirmed, 20 N. Y. 65; disapproving, on this point, *Brand v. Schenectady &c. R. Co.*, 8 Barb. 368.



the majority of prudent and careful men would take in the same situation to avoid the same risks to their own persons. And since human life is always more or less endangered by the speed at which trains are run and other peculiarities of the business, it is the duty of a railroad company to take such precautions against danger as the magnitude of the peril demands. The ordinary care to be used in the management of a railroad, may, therefore, and sometimes does, require precautions which, if used in any business involving less risk, would be deemed equivalent to the utmost care.<sup>1</sup>

§ 478. Frequent attempts have been made to convict railroad companies of negligence on the mere ground of the speed at which their trains have been run. But it never has been, and we trust never will be, established as a rule of law that any conceivable rate of speed is *per se* evidence of negligence.<sup>2</sup> The whole object of the railroad system is to attain a high speed of travel; and the vast saving of time which the community makes by every increase in the rapidity of travel, with the corresponding increase in the productive power of nations, should make

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<sup>1</sup> In *Johnson v. Hudson River R. Co.* (20 N. Y. 65; affirming S. C., 6 Duer, 633), it appears that the defendant ran large and heavy cars, drawn by horses, upon tracks laid along the center of a city street. A car thus running on a dark night ran over and killed the plaintiff's intestate. The judge at the trial charged that, under the circumstances, the defendant was "bound to exercise the utmost care and diligence, and for the purpose of avoiding accidents endangering property and life, to use all the means and measures of precaution that the highest prudence would suggest, and which it was in its power to employ." On appeal, first to the general term of the Superior Court, and next to the Court of Appeals, this instruction was held to be proper. In the latter court, Denio, J., said: "The judge \* \* \* was calling the attention of the jury to the peculiarities of the case before them. He did not, in my opinion, overstate the obligations which attach to persons running cars in the night over a course which is also a public street." The fact that an engine was running under the charge of a fireman only, is some evidence of negligence (*O'Mara v. Hudson River R. Co.*, 38 N. Y. 445).

<sup>2</sup> See *Withers v. North Kent R. Co.*, 27 L. J. [Exch.] 417; 3 Hurlst. & N. [Am. ed.] 969; *Sharrod v. London & Northw. R. Co.*, 4 Exch. 580.

courts and juries cautious lest they hinder the progress of the world by an unwise timidity. If the track is decayed, or loosely laid (as is too often the case in America), a high speed is no doubt dangerous. There are many railroads upon which it would be more dangerous to travel thirty miles in an hour, than to move at double the speed upon a well built and equipped road. So, where the road passes through a village, town, or city, the speed of its trains should obviously be diminished in proportion to the liability of meeting persons on the track.<sup>1</sup>

§ 479. In South Carolina, proof that horses or cattle were killed by a train is sufficient *prima facie* evidence of negligence on the part of the railroad company.<sup>2</sup> This may be right where the common law of the state binds the railroad company to fence out cattle. But where the English common law rule prevails, the plaintiff must give further evidence than this in order to make out a *prima facie* case.<sup>3</sup> The burden of proof is upon the plaintiff to show that the

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<sup>1</sup> Lafayette &c. R. Co. v. Adams, 26 Ind. 76. The law not having fixed the rate of speed at which cars may be run upon a railroad, in and across the streets of a city, it is generally a question of fact, in each case, whether the actual rate was excessive or dangerous. Whether it is so or not will depend, to some extent, upon the safeguards which are adopted to prevent accidents. It is not correct to say that in every case where a fault in this respect is alleged, the question must be submitted to the jury. If it be clearly shown that on the occasion in question the velocity was not greater than that which had been usually practised before, with the tacit consent of the community and without accident, it should not be considered an open question whether running at that rate was negligent and unlawful (Wilds v. Hudson River R. Co., 29 N. Y. 315).

<sup>2</sup> Danner v. South Carolina R. Co., 4 Rich. Law, 329; Murray v. South Carolina R. Co., 10 Id. 227. And see Balcom v. Dubuque &c. R. Co., 21 Iowa, 102; Whitbeck v. Dubuque &c. R. Co., Id. 374. This rule does not extend to the case of a dog (Wilson v. Wilmington &c. R. Co., 10 Rich. Law, 52). As to what evidence will suffice to show that the company's engine injured the cattle, see Illinois Central R. Co. v. Whalen, 42 Ill. 396.

<sup>3</sup> It is so held in North Carolina (Scott v. Wilmington &c. R. Co., 4 Jones [N. C.] Law, 432). It is the duty and right of a railroad corporation to carry a head-light, if necessary to the safety of the train, however much it may increase the danger to cattle which are suffered to stray upon its track (Bellefontaine &c. R. Co. v. Schruyhart, 10 Ohio St. 116).

cattle were lawfully there, and that the railroad company was negligent.<sup>1</sup> And if the cattle were not lawfully there, he must prove such negligence as will nevertheless make the company liable.<sup>2</sup> Where it appears that the engineer sees cattle on the track, and could have stopped the train in time to avoid injuring them, but did not, the company is liable.<sup>3</sup> Even where cattle may lawfully run at large, the South Carolina rule is not followed.<sup>4</sup> If the statutes concerning fences are relied upon as the ground of the action, the plaintiff must prove the want of, or defect in, a fence.<sup>5</sup>

§ 480. In America, from motives of economy, railroads are almost universally constructed upon the same grade with the neighboring highways, and frequently run for short distances directly along the center of highways. The result necessarily is that travelers upon the highways are continually obliged to cross the tracks of railroads, and frequently obliged to travel beside, or even upon, the rails. Where this is the case, it is obvious that the obligation to use ordinary care requires that the cars should be run with much more caution than upon a road exclusively occupied by the railroad company.<sup>6</sup> And when cars are thus passing along a highway *at night*, the added danger demands additional precautions corresponding to

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<sup>1</sup> Galpin v. Chicago &c. R. Co., 19 Wisc. 604; Indianapolis &c. R. Co. v. McClure, 26 Ind. 370.

<sup>2</sup> *Ib.* It was there said that gross negligence or willful injury must be shown.

<sup>3</sup> Illinois Central R. Co. v. Middlesworth, 46 Ill. 495. And so held, where the engineer would have seen the cattle if he had kept a proper look-out (Chicago, B. & Q. R. Co. v. Cauffman, 38 Ill. 424).

<sup>4</sup> Chicago &c. R. Co. v. Utley, 38 Ill. 410.

<sup>5</sup> Indianapolis &c. R. Co. v. Wharton, 13 Ind. 509; Ohio &c. R. Co. v. Brown, 23 Ill. 94; Galena & Chicago R. Co. v. Sumner, 24 Ill. 631.

<sup>6</sup> Wilson v. Cunningham, 3 Cal. 241. And an engineer is bound to anticipate some degree of carelessness on the part of persons crossing the track, when experience has proved it to be common (Card v. N. Y. & Harlem R. Co., 50 Barb. 39).

the risk to which the lives and property of travelers are exposed.<sup>1</sup>

§ 481. The rights of a traveler on the highway, at a point where it is crossed by a railroad, are not subordinate to those of the railroad company,<sup>2</sup> nor superior to them,<sup>3</sup> but equal; and both parties are bound to use ordinary care,<sup>4</sup> the one to avoid committing,<sup>5</sup> and the other to avoid receiving injury.<sup>6</sup> For this purpose, it is the duty of the

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<sup>1</sup> *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; affirming 6 Duer, 633. In that case it appeared that a horse-car of the defendant, without lights or bells, was proceeding on a dark evening upon its railroad in a street of New York city, obstructed by a sewer in the process of construction. The plaintiff, a sober cartman, was found dead upon the track, under circumstances authorizing the inference that he had fastened his horse, and was groping in the dark to find a safe passage for his team, when struck by the defendant's car. There was no witness of the accident. Held, that the dangerous tendency of the defendant's conduct was such as, in the absence of any other evidence than the presumption that the plaintiff had the same regard for his safety as other men, to authorize the attributing of the accident to the negligence of the defendant, and the refusal of a nonsuit.

<sup>2</sup> *Warner v. N. Y. Central R. Co.*, 45 Barb. 299.

<sup>3</sup> *Galena &c. R. Co. v. Dill*, 22 Ill. 264; *North Penn. R. Co. v. Heileman*, 49 Penn. St. 60. At a railroad crossing, neither the travelers upon the highway, nor the railroad company, have an exclusive right of passage, but their rights are concurrent (*North Penn. R. Co. v. Heileman*, 49 Penn. St. 60). "Railroad companies, in operating their cars, must be held, in crossing public highways and thoroughfares, to so regulate the speed of their trains, and to give such signals to persons passing, that all may be apprised of the danger of crossing the railroad track. And they should also keep a lookout, so as to see, and, as far as possible, prevent injury to, others exercising their legal rights. A failure in any of these duties on their part should render them liable for injuries inflicted, and from wrongs resulting from its omission. But while the road is held to this degree of care, it is equally the duty of a person crossing the track of a railroad to be on his guard, and to see that he is not incurring danger to himself and to his property. He has no right to shut his eyes and close his ears to the danger he is liable to incur at such a place; and if he does, then he must be responsible for the consequences of his carelessness, unless the other party has been guilty of misconduct still more gross and willful" (per Walker, J., *Chicago & Rock Island R. Co. v. Still*, 19 Ill. 499).

<sup>4</sup> *Brand v. Schenectady &c. R. Co.*, 8 Barb. 368; *Shaw v. Boston & Worcester R. Co.*, 8 Gray, 45; *Cleveland &c. R. Co. v. Terry*, 8 Ohio St. 570, 580.

<sup>5</sup> *Warner v. N. Y. Central R. Co.*, 45 Barb. 299; *Macon &c. R. Co. v. Davis*, 18 Geo. 679; *Linfield v. Old Colony R. Co.*, 10 Cush. 562; *Bradley v. Boston & Maine R. Co.*, 2 Cush. 539; see *Brand v. Schenectady &c. R. Co.*, 8 Barb. 368.

<sup>6</sup> *Stubley v. London & Northwestern R. Co.*, Law Rep. 1 Exch. 18; 4 Hurlst. &

engineer to give sufficient signals of the approach of the train, by ringing his bell, sounding the whistle, or otherwise, as may be usual, and also to approach a crossing at such a rate of speed as will enable him to check the train if necessary.<sup>1</sup> More than this cannot be required,<sup>2</sup> unless the engineer has actual notice of special circumstances demanding special care, such as the presence of any person or thing upon the track, or the like. An engineer, on perceiving that any one is on the track, ought to blow his whistle, and to make any other signals in his power to give warning of the danger; and his failure to do so at a public crossing is strong evidence of negligence on the part of the railroad company.<sup>3</sup> But where an engineer sees persons or teams waiting to cross the railroad, he is not bound to anticipate that they will attempt to cross in view of the train; and, therefore, he is not required to check his speed so much as would be necessary to enable them to cross in front of him.<sup>4</sup> Positive testimony that the head-

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C. 83; *Shaw v. Boston & Worcester R. Co.*, 8 Gray, 45; *Chicago &c. R. Co. v. Still*, 19 Ill. 499; *Brand v. Schenectady &c. R. Co.*, 8 Barb. 368. A traveler upon a highway who fails to look out for approaching railroad trains is guilty of negligence, and cannot recover for injuries received from a collision with a passing train (*North Penn. R. Co. v. Heileman*, 49 Penn. St. 60).

<sup>1</sup> *Lafayette &c. R. Co. v. Adams*, 26 Ind. 76.

<sup>2</sup> When the engineer of a train of cars sounds the whistle and rings the bell, and runs the train at a reasonable speed in approaching a crossing, he exercises reasonable and ordinary care, which is all the law requires (*Toledo &c. R. Co. v. Goddard*, 25 Ind. 185; see *Chicago &c. R. Co. v. Gretzner*, 46 Ill. 75). The neglect of an employee to give signals, required by the rules of the company merely for the guidance of its servants, cannot be taken advantage of by a stranger (*Schwartz v. Hudson River R. Co.*, 4 Robertson, 347).

<sup>3</sup> In an action against a railroad company, by the widow and children of a decedent, to recover damages for an injury occurring at a crossing of a public street within the limits of a city, and causing his death, it was held not error to instruct the jury that if the whistle of the engine was not sounded, nor any other usual notice given of the approach of a train, the deceased had a right to presume that the track was clear, and that unless the jury were satisfied by affirmative proof that the deceased did not use ordinary care, the defendant was liable for the consequences of his injury (*Philadelphia R. Co. v. Hagan*, 47 Penn. St. 244).

<sup>4</sup> It is not any want of ordinary care for a train of cars to approach a crossing at

light of an engine was burning, or that a bell or whistle was sounding, is entitled to more weight than negative evidence in relation to such facts;<sup>1</sup> and where the affirmative evidence on such a point is clear and circumstantial, a verdict against it cannot be allowed to stand on the negative evidence of persons who had not special facilities for knowing the facts.<sup>2</sup>

§ 482. The company and its servants are not usually bound to anticipate the crossing of any person at a place not marked by a definite path; and an engineer is not blameable for not making signals to a person thus crossing, unless he has actual notice of the fact. Nor can a person crossing at an unusual place be heard to complain that he was misled by the undue proximity of trains. The rules which regulate the distance at which trains shall run from each other on a railroad are intended solely for the protection of the property of the company, and to secure the safety of their employees and passengers, and not for the guidance of persons who may be traveling along the highway; and no inference of negligence can be drawn from the proximity of trains, in an action to recover damages for an injury done to a person while crossing the railroad track, at a place not known or used as a public crossing.<sup>3</sup> Where, for any good reason, a person has a right to cross, and may reasonably be expected to do so at the time which he selects for that purpose, the same rules apply as in the case of a highway crossing.<sup>4</sup> A railroad company is not liable for an injury

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its usual speed, although there is a carriage approaching or standing near it (*Telfer v. Northern R. Co.*, 30 N. J. [Law], 188).

<sup>1</sup> *Chicago & Rock Island R. Co. v. Still*, 19 Ill. 499; see *Beisiegel v. N. Y. Central R. Co.*, 40 N. Y. 9, 19.

<sup>2</sup> *Seibert v. Erie R. Co.*, 49 Barb. 583.

<sup>3</sup> *Phil. & Reading R. Co. v. Spearen*, 47 Penn. St. 300.

<sup>4</sup> The plaintiff, without having procured a ticket, was crossing a side track of a

done to property lawfully laid across its track, unless the engineer of a passing train is seasonably warned to stop, in such manner as to inform him of his duty to do so, since he has a right to presume that it is his duty to proceed.<sup>1</sup>

§ 483. There is no general rule of law which requires that railroad companies should station a flagman or watchman at every highway crossing ;<sup>2</sup> nor is it even a question to be left in all cases to a jury.<sup>3</sup> A jury may determine whether a man ought to be stationed at a crossing where there is peculiar danger of accidents, as from the sharpness of a curve, and the difficulty of seeing approaching trains, where many pass ;<sup>4</sup> but a jury cannot be allowed to decide that a watchman must be kept where no statute requires him to be, and where the track runs in a straight line, and is easily visible for a considerable distance each way.<sup>5</sup> Yet, where a railroad company is under

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railroad in the night, to get upon a passenger train at its usual place of stopping on the main track ; but by the negligence of the employees of the company a switch had been left open, and the train ran upon the side track against the plaintiff, and broke his leg. Held, (1.) That he was not a passenger at the time of the injury. (2.) That he had the same right to cross the side track as he did that persons have to cross a railroad upon a public street or highway. (3.) That the company having the legal right to run its train upon the side track, it is immaterial whether it was run upon that track by accident or design, if run with due care. No greater care would be required in case of such accident than if the train was thrown upon the track by design. (4.) That if the train, in running upon the side track, was managed with due care, the plaintiff could not recover (*Indiana Central R. Co. v. Hudelson*, 13 Ind. 325).

<sup>1</sup> *Mott v. Hudson River R. Co.*, 1 Robertson, 585.

<sup>2</sup> *Stubley v. London & Northwestern R. Co.*, Law Rep. 1 Exch. 13 ; 4 Hurlst. & C. 83 ; see *Walker v. Midland R. Co.*, 14 Law Times [N. S.] 796 ; *Bilbee v. London, Brighton & c. R. Co.*, 18 C. B. [N. S.] 584.

<sup>3</sup> *Ib.*

<sup>4</sup> *Bilbee v. London, Brighton & c. R. Co.*, 18 C. B. [N. S.] 584.

<sup>5</sup> *Stubley v. London & Northwestern R. Co.*, Law Rep. 1 Exch. 13 ; 4 Hurlst. & C. 83 ; *Beisiegel v. N. Y. Central R. Co.*, 40 N. Y. 9 ; overruling *Kinney v. Crocker*, 18 Wisc. 74. It is no want of ordinary care for a railroad company not to station a flagman at a crossing which is in a sparsely settled locality, and where the track, for some distance up and down it, can be seen by one approaching on the highway (*Telfer v. Northern R. Co.*, 30 N. J. [Law], 188).

no original obligation to station a flagman at a particular crossing, if it has done so for many years, travelers have a right to presume, in case of his absence, that the road is clear.<sup>1</sup> So they have where the company is legally bound to keep a man at the crossing, though the obligation be created only in favor of other persons.<sup>2</sup> In England, railroad companies are bound by statute to keep a man at every turnpike road or public carriage road to open and shut the gates.<sup>3</sup> Under this statute, the man in charge of a gate must use a reasonable discretion as to the time of opening it; and it is negligence in him, for which his principal is responsible, to open a gate and invite a vehicle to pass through when a train is approaching.<sup>4</sup> It is unquestionably the duty of the company to have a person in constant attendance upon a switch, unless it is permanently fastened down.<sup>5</sup>

§ 484. Certain precautions are required of railroad companies by statutes or local ordinances, and enforced

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<sup>1</sup> Warner v. N. Y. Central R. Co., 45 Barb. 299. To the same effect is Ernst v. Hudson River R. Co., 35 N. Y. 9, 35, 42; S. C. again, 39 N. Y. 61. The defendant, a railroad company, employed a flagman at a certain point on their road, to warn persons traveling along a highway crossing their road at that point, of the approach of a train. On a certain day this flagman was intoxicated and absent from his post, and in consequence, the plaintiff, while crossing the railroad with a horse and buggy, was run over by a train of cars and badly hurt. Held, that it was competent for the plaintiff to show that the flagman had been in the habit of getting drunk for some weeks before the accident (Warner v. N. Y. Central R. Co., 45 Barb. 299).

<sup>2</sup> Stapley v. London, Brighton &c. R. Co., Law Rep. 1 Exch. 21; 4 Hurlst. & C. 93. The plaintiff in that case was a foot passenger, and the obligation to keep a watchman was created solely for the benefit of drivers of vehicles.

<sup>3</sup> Stat. 8 & 9 Vic. c. 20, § 47; cited fully on p. 529.

<sup>4</sup> Lunt v. London & Northwestern R. Co., Law Rep. 1 Q. B. 277.

<sup>5</sup> In an action for damages against a railroad company, for an injury sustained by a passenger in a train thrown from the track, in consequence of the misplacement of a switch, which was situated where the switch indicator could not be seen by the engineer in season to prevent an accident, the fact that no switch-tender was stationed at that point was held presumptive evidence of negligence, though not conclusive (Baltimore & Ohio R. Co. v. Worthington, 21 Md. 275).



by the imposition of penalties for their neglect,—such, for example, as a limitation of speed in certain places, a requirement that a bell shall be rung on approaching a highway, &c. These regulations being clearly intended for the protection of travelers, it would seem natural to suppose that any violation of them should be deemed culpable negligence, in an action brought by a traveler. And so it is generally held.<sup>1</sup> But in the state of New York, the court of last resort has apparently held, on one occasion, that the breach of such regulations is not to be visited with any other consequences than the penalty expressly affixed thereto by the statute or ordinance, and that if the statute prescribes a mere fine or other special penalty, without giving in terms a claim for damages to parties injured by its violation, it is not to be taken into account in determining, in a civil action, whether the company was guilty of negligence or not.<sup>2</sup> We do not think,

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<sup>1</sup> *Liddy v. St. Louis R. Co.*, 40 Mo. 506. A person has a right to assume that a train is moving at a lawful rate until the contrary is made apparent; and the fact that the speed was unlawful must, therefore, be considered in determining the question of negligence, in the case of a plaintiff who was injured while crossing a railway track (*Langhoff v. Milwaukee &c. R. Co.*, 19 Wisc. 489).

<sup>2</sup> *Brown v. Buffalo &c. R. Co.*, 22 N. Y. 191. In that case it appeared that, by an ordinance of the city of Buffalo, the defendant was prohibited from running its cars through the city at a greater speed than six miles an hour, under a penalty of \$150 for each offense. It was proved that the plaintiff was injured by the defendant's cars, in the city of Buffalo, while they were moving at a greater rate of speed than six miles an hour. The judge charged the jury that if the injury would not have occurred except for such violation of the ordinance, the defendant was liable. Held, an erroneous instruction, and the judgment reversed; the Court of Appeals holding that the plaintiff must prove that, irrespective of the ordinance, the rate of speed was a dangerous one under the circumstances, if he meant to rely upon such speed as evidence of negligence. But it should be observed that this decision was rendered by a bare majority of the court: three judges dissenting on the ground that statutes and ordinances of this character were intended to provide a warning to persons negligently approaching the track, and that it was a question for the jury whether the plaintiff's negligence was such that, even if the municipal regulation had been complied with, he would still have been injured. The decision was justly criticised by Davis, J., in the following language: "*Brown v. Buffalo & State Line R. Co.* (22 N. Y. 191) stands upon grounds altogether too doubtful to justify its application to cases not strictly within it. The opinion confounds all distinction be

however, that this decision will be followed in any other state; and we doubt whether it will long be adhered to even in New York. Statutes of this kind are certainly not the exclusive measure of the duties of a railroad company in such situations; and it is not necessarily absolved from blame by showing that it complied with all statutory regulations, since, while doing so, it may have neglected its common law duties.<sup>1</sup>

§ 485. Statutes in New York<sup>2</sup> and other states make railroad companies liable for any damage caused by their neglect to ring the bell upon any of their engines for at least eighty rods before reaching a crossing on a level with the highway. And this must be done almost, if not quite, continuously.<sup>3</sup> An omission thus to ring the bell, therefore, is competent evidence of negligence,<sup>4</sup> though not conclusive, unless the jury believe that it produced the injury.<sup>5</sup> When a human being has been injured at a railroad crossing, there is a reasonable presumption that the warn-

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tween civil remedies and criminal punishments, and the authorities cited by it go no farther than to hold that, where a specific penalty is prescribed by a law forbidding an act not *per se* criminal, the act is *not otherwise punishable as a public offense*. It failed to recognize the axiomatic truth that every person while violating an express statute is a wrong-doer, and, as such, is *ex necessitate* negligent in the eye of the law, and that every innocent party, whose person is injured by the act which constitutes the violation of the statute, is entitled to a civil remedy for such injury, notwithstanding any redress the public may also have. It ignores, also, the principle, that every person pursuing his lawful affairs in a lawful way has a right to assume, and act upon the assumption, that every other person will do the same thing" (Jetter v. N. Y. & Harlem R. Co., 2 Keyes [N. Y.] 154).

<sup>1</sup> Linfield v. Old Colony R. Co., 10 Cush. 561; Bradley v. Boston & Maine R. Co., 2 Cush. 539.

<sup>2</sup> Laws 1850, ch. 140, p. 232, § 39.

<sup>3</sup> Chicago, B. & Q. R. Co. v. Triplett, 38 Ill. 482.

<sup>4</sup> Ernst v. Hudson River R. Co., 35 N. Y. 9, 35; Renwick v. N. Y. Central R. Co., 36 N. Y. 132; Galena &c. R. Co. v. Dill, 22 Ill. 264; Wright v. Malden &c. R. Co., 4 Allen, 283; Augusta &c. R. Co. v. McElmurry, 24 Geo. 75; see Linfield v. Old Colony R. Co., 10 Cush. 562.

<sup>5</sup> Galena &c. R. Co. v. Dill, 22 Ill. 264. The jury may excuse the omission, as prudent under the circumstances (Wakefield v. Connecticut &c. R. Co., 37 Verm. 330).

ing conveyed by the sound of a bell or whistle would have been beneficial to him; and, therefore, in such a case, it should be presumed that his injury was caused by the omission of such signals, if they were omitted.<sup>1</sup> But if, without these signals, the injured person knew, or by the exercise of ordinary care would have known, of the proximity and approach of the train, this presumption is rebutted; and, without further evidence connecting the omission of signals with the injury, the company is not responsible for it on that ground.<sup>2</sup> If there is an omission to ring the bell or sound the whistle, and an injury is occasioned thereby, the burden is upon the company to show that such omission was reasonable and prudent, in view of the actual condition of things at the time.<sup>3</sup> A statute of this kind, however, is only for the benefit of persons traveling along the highway, and cannot be made the ground of an action by one who is injured while walking along the track of the railroad;<sup>4</sup> though one who crosses the railroad on an open

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<sup>1</sup> In *Beisiegel v. N. Y. Central R. Co.* (34 N. Y. 622), the plaintiff sued the railroad company for negligently running a steam-engine against him while crossing the track on a city street. No signals were made and no bell rung. Held, per Porter, J., that "the omission of the customary signals was an assurance by the company to the plaintiff, that no engine was approaching within a quarter of a mile on either side of the crossing." And per Morgan, J., that "The very object of requiring the engineer to sound an alarm before reaching the crossing is to put the way traveler on his guard; and when the engineer neglects the necessary signals, he deprives the traveler of one of the means upon which he has a right to rely for protection against the danger of a collision." Compare *Havens v. Erie R. Co.*, 41 N. Y. 296.

<sup>2</sup> *Steves v. Oswego &c. R. Co.*, 18 N. Y. 422; *Brooks v. Buffalo &c. R. Co.*, 25 Barb. 600; *Dascomb v. Buffalo &c. R. Co.*, 27 Barb. 221; *Telfer v. Northern R. Co.*, 30 N. J. [Law], 188. In *Galena &c. R. Co. v. Loomis* (13 Ill. 548), the plaintiff drove across a railroad track "immediately before and within a few feet" of the locomotive, his horses became frightened, upset the wagon, ran off, and were lost, and plaintiff himself was considerably hurt. The evidence showed that no bell was rung or whistle sounded on approaching the crossing. Held (per Trumbull, J.), that "until some proof is given, tending to show that the injury resulted from the failure to ring a bell or blow a whistle, the burden of proving a negative, and that it did not arise from such failure, should not be thrown on the company."

<sup>3</sup> *Wakefield v. Connecticut &c. R. Co.*, 37 Verm. 330.

<sup>4</sup> *O'Donnell v. Providence &c. R. Co.*, 6 R. I. 211; compare *Wakefield v. Connecticut &c. R. Co.*, 37 Verm. 330.

space adjoining the highway, is entitled to the benefit of the statute.<sup>1</sup>

§ 485 *a*. In the case of injuries to animals, the better authority seems to favor the doctrine that a failure to ring the bell or sound the whistle does not raise a presumption that the injury was caused thereby.<sup>2</sup> Upon the whole, it seems to be a question for the jury, in regard to which no legal presumptions are to be made.<sup>3</sup>

§ 486. A railroad company is not liable for injuries suffered by animals solely in consequence of their being frightened by the noise necessarily made by an engine or train.<sup>4</sup> But any noise unnecessarily made, or made at a

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<sup>1</sup> See *Toledo &c. R. Co. v. Fergusson* (42 Ill. 449), in which this principle is clearly adjudged, though applied to the case of an animal, and not a human being.

<sup>2</sup> In *Illinois Central R. Co. v. Phelps* (29 Ill. 447), an action was brought to recover the value of a horse killed by a locomotive of the company. There was a difference among the witnesses, as to the fact of the sounding of the whistle, or ringing of the bell. Held, that an omission to ring a bell or sound a whistle at a railroad crossing does not render the company liable for injury to animals, unless it is made to appear that the ringing or sounding would have prevented the injury. In *Pittsburgh &c. R. Co. v. Karns* (13 Ind. 87), the facts were these: The plaintiff was unloading his wagon at a point about three rods back from the railroad track. An engine with its head-light burning was standing near by. Soon after the engine began to move toward the warehouse, when Karns' horses started and run, but soon "slackened up" and stopped, no damage having yet been done. Karns thereupon attempted to leap on the back of one of the horses to seize the lines, but failed and fell, started the horses afresh, was run over and injured. The only carelessness alleged against the railroad company was that no signal was sounded when the locomotive started. Held, that "if the company failed to ring the bell and blow the whistle, still, if such failure did not cause the horses to run away," the company was not liable. In *Aycock v. Wilmington &c. R. Co.* (6 Jones [N. C.] Law, 231), it appeared that the train was running at a speed greater than usual, upon a straight part of the road, in the day-time, and that one of several cattle, that were feeding near and crossing the road, was killed by the locomotive. It was shown that no whistle was blown to drive the cow from the road. Held to be negligence, that the speed of the train was not lessened, and the usual method of sounding the whistle resorted to, for the purpose of driving off the cattle.

<sup>3</sup> See *Great Western R. Co. v. Yeddis*, 33 Ill. 304; *Chicago &c. R. Co. v. Reid*, 24 Ill. 144; *Galena &c. R. Co. v. Dill*, 22 Ill. 264; *Toledo &c. R. Co. v. Foster*, 43 Ill. 415; *Chicago, B. & Q. R. Co. v. Cauffman*, 38 Ill. 424.

<sup>4</sup> *Burton v. Phil., Wilmington &c. R. Co.*, 4 Harringt. 252.

place where it is likely to frighten animals, when the making of it might just as well be postponed until the train was out of hearing, warrants a finding of culpable negligence.<sup>1</sup>

§ 487. The general rules as to what degree of contributory negligence will deprive an injured person of his right to recover damages, have been stated elsewhere.<sup>2</sup> Some application of them to this branch of the general subject will here be made. Evidence of drunkenness on the part of one crossing or walking down a railroad track, raises a strong presumption of negligence;<sup>3</sup> but it cannot be deemed so conclusive as not to admit of rebuttal. A drunken person sometimes acts with great care, although the contrary is undoubtedly the general rule. Lying down upon a railroad is obviously the grossest negligence, which nothing can well excuse.<sup>4</sup> The negligence of the company in whose cars a passenger is riding is not imputed to him, in an action brought by him against

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<sup>1</sup> *Pennsylvania R. Co. v. Barnett*, 59 Penn. St. 259; *Hill v. Portland &c. R. Co.*, 55 Maine, 438. A railway crossed on a level, at a place where there was considerable traffic. The engine-driver blew off the steam from the mud cocks at that spot, so as to frighten horses waiting to pass over the line. Held, sufficient to warrant a verdict against the company in an action for negligence (*Manchester &c. R. Co. v. Fullerton*, 14 C. B. [N. S.] 54).

<sup>2</sup> *Ante*, chapter III. (§§ 25-52).

<sup>3</sup> Where the plaintiff, while walking across the track of the defendant in the street of a city, was knocked down and seriously injured, it having been proved that she was under the influence of liquor at the time, it was held, that the defendant was not liable (*Brand v. Schenectady & Troy R. Co.*, 8 Barb. 368).

<sup>4</sup> The plaintiff's slave lay down to sleep in the day-time, on a railroad track, where the train could have been seen for more than a mile. The cars approached at their usual speed at the usual hour; and the engineer, when within a short distance of the slave, attempted to stop the engine by letting off the steam and reversing the wheels. Held, that the company was not liable (*Herring v. Wilmington &c. R. Co.*, 10 Ired. [N. C.] Law, 402; *Sims v. Macon &c. R. Co.*, 28 Geo. 93; see *Holmes v. Central R. Co.*, 37 Geo. 593). In *Felder v. Louisville &c. R. Co.* (2 McMullan, 403), and *Richardson v. Wilmington & Manch. R. Co.* (8 Rich. Law, 120), slaves were asleep upon the track, and were killed without any effort to stop the train; but it did not appear that the engineer saw them. The companies were held not to be liable.

another railroad company.<sup>1</sup> But the fractiousness of a horse with which the plaintiff is attempting to cross, if it contributes to his injury, is to be imputed to him as negligence,<sup>2</sup> unless occasioned by fault on the part of the railroad company, as, for example, by a defect in the track at a highway crossing.<sup>3</sup> If any act is directed by the agent of the railroad company in charge at the particular spot, the plaintiff is justified in obeying such direction,<sup>4</sup> and cannot be charged with contributory negligence, although

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<sup>1</sup> *Chapman v. N. Y. & New Haven R. Co.*, 19 N. Y. 341; *Colegrove v. N. Y. & Harlem R. Co.*, 6 Duer, 382; affirmed, 20 N. Y. 492. The principle of these cases has been re-affirmed, and the doctrine of our note to section 46 fully sustained by the New York Court of Appeals, in a recent case (*Webster v. Hudson River R. Co.*, 38 N. Y. 260).

<sup>2</sup> *Illinois Central R. Co. v. Buckner*, 28 Ill. 299.

<sup>3</sup> *Milwaukee & C. R. Co. v. Hunter*, 11 Wisc. 160.

<sup>4</sup> So held, where the agent invited the plaintiff to cross at a dangerous place (*Warren v. Fitchburg R. Co.*, 8 Allen, 227; *Lunt v. London & Northwestern R. Co.*, Law Rep. Q. B. 277) immediately behind a train (*Nicholson v. Lancashire & C. R. Co.*, 3 Hurlst. & C. 534), where he ordered the plaintiff to step from one car to another while they were in motion (*McIntyre v. N. Y. Central R. Co.*, 37 N. Y. 287; affirming *S. C.*, 43 Barb. 532), and where he ordered the plaintiff, who was a mere trespasser, to get off while the car was in motion (*Lovett v. Salem & C. R. Co.*, 9 Allen, 557). N. was unloading the defendant's cars at the place on a side track, where by agreement with the owners of the freight they had been left for unloading, and at the very point designated by the defendant's agent, using his team for that purpose, as all the parties contemplated when the arrangement was made. While N. was thus engaged, a locomotive approached on the main track, and his horses becoming frightened, he received an injury resulting in his death. It appeared that there were other tracks which might have been used at the time. Held, that it was a part of the agreement between the owners of the freight and the railroad company, that the person going for the freight should not be molested or endangered in his person or property by any act on the part of the company, and that the act of the defendant in running its engine over that track, at the time and under the circumstances, was a clear act of negligence and a breach of duty on its part toward N. (*Newson v. N. Y. Central R. Co.*, 29 N. Y. 383). A railroad company made a private crossing over their track, in a city, and allowed the public to use it as a highway, stationing a flagman there to prevent persons from crossing when there was danger. Held, that they were liable in damages to one who, using due care, was induced to undertake to cross by a signal from the flagman that it was safe, and was injured while so crossing by a collision which occurred through the flagman's negligence (*Sweeney v. Old Colony & Newport R. Co.*, 10 Allen, 368. Compare *Shaw v. Boston & Worcester R. Co.*, 8 Gray, 45). But a mere permission to do a negligent act does not affect the company's rights (*Hickey v. Boston & Lowell R. Co.*, 14 Allen, 429).

the act were one which, apart from this circumstance, would be deemed negligent. And so, where the servants of a railroad company, believing that a train was about to run off a misplaced switch, frightened a lady by their conduct, so that, in endeavoring to escape from the apprehended danger, she fell on the track, and was injured, it was held that she could recover.<sup>1</sup> The application of the rule of contributory negligence to the owners of animals unlawfully entering upon the track is stated in the chapter on RAILROAD FENCES.

§ 488. It is generally deemed culpable negligence for any one to cross the track of a railroad operated by steam power without taking any precautions (if any are reasonably within his power) to ascertain whether a train is approaching;<sup>2</sup> and as a general but not invariable rule, it is such negligence to cross without looking in every direction that the rails run, to make sure that the road is clear.<sup>3</sup>

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<sup>1</sup> Caswell v. Boston & Worcester R. Co., 98 Mass. 194.

<sup>2</sup> Wilds v. Hudson River R. Co., 29 N. Y. 315, 327; S. C. previously, 24 Id. 430; Steves v. Oswego &c. R. Co., 18 Id. 422; Mackey v. N. Y. Central R. Co., 27 Barb. 528, 542; but compare S. C. on appeal, 35 N. Y. 75. A person sitting in the bottom of a wagon, who could have seen the cars approach, but turned his back to that direction, and had his ears so bandaged that he could not hear, is guilty of contributory negligence (Chicago & Rock Island R. Co. v. Still, 19 Ill. 499; Hanover R. Co. v. Coyle, 55 Penn. St. 396). Where the plaintiff was engaged in taking freight across a railroad track, and was so absorbed in his work that he omitted to notice a train backing down, although it had repeated the operation three times in ten minutes, it was held, as matter of law, that he could not recover for an injury caused by the train striking him (Carroll v. Minn. Valley R. Co., 13 Minn. 30; and see Roth v. Milwaukee &c. R. Co., 21 Wisc. 256).

<sup>3</sup> This rule has been enforced in a number of cases (Steves v. Oswego &c. R. Co., 18 N. Y. 422; Brooks v. Buffalo &c. R. Co., 27 Barb. 532, n.; affirming S. C., 25 Id. 600; Brendell v. Buffalo &c. R. Co., 27 Barb. 534, n.; Dascomb v. Buffalo &c. R. Co., 27 Barb. 221; Bieseigel v. N. Y. Central R. Co., 40 N. Y. 9; S. C., 33 Barb. 429; compare S. C., 34 N. Y. 622; North Penn. R. Co. v. Heileman, 49 Penn. St. 60; Butterfield v. Western R. Co., 10 Allen, 532; Chicago &c. R. Co. v. Gretzner, 46 Ill. 75; Toledo &c. R. Co. v. Goddard, 25 Ind. 185; Stublely v. London & Northwestern R. Co., Law Rep. 1 Exch. 13, 19; 4 Hurlst. & C. 83). And if it appears that the injured person could have plainly seen a train approaching, if he had looked, it will be presumed that he did not look (Wilcox v. Rome &c. R. Co., 39 N. Y. 358; Gonzales v. N. Y. & Harlem R. Co., 38 N. Y. 440).

But in all the cases where this rule has been enforced, the circumstances made it reasonable, as the most natural and reasonable way of ascertaining that there was no danger. Where, however, the injured party had other satisfactory evidence that it was safe for him to proceed, it has been held that he was not absolutely bound to look up or down the track.<sup>1</sup> If the track is so obstructed that the traveler cannot see along it, it may be sufficient for him to *listen* for the approach of a train.<sup>2</sup> A deaf person should use additional precautions on account of his infirmity before crossing a railroad. It certainly does not excuse him from ordinary care.<sup>3</sup> It is an act of negligence to cross the

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<sup>1</sup> *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 36; *McGrath v. Hudson River R. Co.*, 32 Barb. 144; *Warren v. Fitchburg R. Co.*, 8 Allen, 227; see *Brown v. N. Y. Central R. Co.*, 32 N. Y. 597.

<sup>2</sup> *Beisiegel v. N. Y. Central R. Co.*, 34 N. Y. 622; see *Mackay v. N. Y. Central R. Co.*, 35 N. Y. 75. Driving across a railroad while sitting at the bottom of the wagon, so as to be unable to see any thing, and with ears muffled up, is enough to prevent the plaintiff from recovering, unless "gross negligence" is shown on the part of the railroad company (*Chicago &c. R. Co. v. Still*, 19 Ill. 499).

<sup>3</sup> *Illinois Central R. Co. v. Buckner*, 28 Ill. 299; *Cleveland &c. R. Co. v. Terry*, 8 Ohio St. 570. Where a deaf mute slave, who was walking on a railroad track from the direction of an approaching train, was killed by the train, it not appearing that the engineer knew of the slave's infirmity, and it appearing that the usual warning was given by the steam-whistle sufficient to have enabled one endowed with hearing to make his escape, it was held that the company was not liable for the injury (*Poole v. North Carolina R. Co.*, 8 Jones [N. C.] Law, 340). A railway crossed a footway on a level, and on each side of the railway the railway company put a swing gate, which closed of its own accord, and on the top of the post of each gate was a ring which a pointsman at an adjoining signal-box was able, by working a lever there, to raise or fall. When it so fell, it would ordinarily fall over the post so as to keep the gate securely closed; and this was usually done when a train was approaching. There were several lines of railway running over this crossing, and a foot passenger standing at the gate could only see about twenty yards up or down the lines; but when he had crossed to the first line, he could see a distance of three hundred yards; and when he had reached the six-foot way, being a space between the two sets of rails, he could see as far as five hundred or six hundred yards. A foot passenger came to the gate when the ring was up, and the gate capable of being opened, but a goods train was standing on the first line in the way of the crossing, and the passenger waited until the train had moved off. He then opened the gate, and attempted to cross the railway; but after he had reached the six-foot way, he was run over and killed by a train. The pointsman and another person called out to him before the accident, to warn him of the danger, and he might have escaped had he heard them, but he was deaf. Held, that the railway company was not liable for the injury (*Skelton v. London & Northwestern R. Co.*, Law Rep. 2 C. P. 681).



track of a railroad using steam power at any other place than the regular crossings.<sup>1</sup> The statutes giving a right of action to persons injured by the neglect of a railroad company to ring a bell at a highway crossing do not confer such right of action irrespective of the injured person's own negligence. One whose own fault has contributed to his injury cannot take advantage of these statutes;<sup>2</sup> nor is the defendant's omission to ring a bell any excuse for the plaintiff's omission to look up and down the track.<sup>3</sup> On the other hand, the fact that the injured person was actually warned of the danger of crossing is not conclusive proof of his negligence. It is evidence of knowledge; but, as warnings are sometimes unfounded and foolish, travelers are not necessarily bound to heed all the cautions addressed to them.<sup>4</sup>

§ 489. It is generally considered culpable negligence to attempt to drive a team across the track of a railroad in full view of an approaching locomotive, on account of

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<sup>1</sup> *Galena &c. R. Co. v. Jacobs*, 20 Ill. 478.

<sup>2</sup> *Steves v. Oswego &c. R. Co.*, 18 N. Y. 422; *Wilcox v. Rome &c. R. Co.*, 39 N. Y. 358; *Dascomb v. Buffalo &c. R. Co.*, 27 Barb. 221; *Brooks v. Buffalo &c. R. Co.*, 25 Barb. 600; *Telfer v. Northern R. Co.*, 30 N. J. [Law] 188; *Galena &c. R. Co. v. Loomis*, 13 Ill. 548; *Ohio &c. R. Co. v. Eaves*, 42 Mo. 288.

<sup>3</sup> *Havens v. Erie R. Co.* 41 N. Y. 296.. But compare *Chicago, B. & Q. R. Co. v. Triplett*, 38 Ill. 482.

<sup>4</sup> In an action against a railroad company for negligence, whereby the plaintiff's father was killed, a warning of danger to the deceased was held mere evidence of negligence on his part, to be considered by the jury; and where the court charged that knowledge of the danger would be proof of negligence, stating the legal consequences, and leaving the jury to apply the law to the facts, but declined to instruct them that the warning constituted negligence, it was held not to be error (*North Pennsylvania R. Co. v. Robinson*, 44 Penn. St. 175). In an action by a widow against a railroad company to recover damages for the loss of her husband's life, the court instructed the jury that if the deceased knew that the "fast line" was approaching, and knew his danger in time to escape, and did not, then the fault was his own, and there could be no recovery. Held, that the instruction should have been that he was to be charged with knowledge, or regarded as knowing, if he had such warnings or opportunities of knowledge as would, with ordinary caution in those circumstances, have saved him from the danger (*Pennsylvania R. Co. v. Henderson*, 43 Penn. St. 449).

the risk of becoming entangled in the rails, even where there is apparently time to cross;<sup>1</sup> and so it is to walk or run across under like circumstances, unless it is very clear that there is ample time to cross, after allowing for the possibility of a misstep. It is not enough that the chances are equally balanced. The decided weight of probability should be against the chance of a collision.<sup>2</sup>

§ 490. A difficult question arises when a highway is completely blocked up by a train standing still across it for an unreasonable length of time, yet ready to start at any moment. There is obvious risk in any attempt to pass through the train, yet travelers might be indefinitely delayed by waiting for it to move. In Massachusetts, it is held that they must thus wait, and content themselves with an action against the company for the delay.<sup>3</sup> If they attempt to pass between the cars, no matter how long the interruption may last, they may be killed with impunity.<sup>4</sup> In Pennsylvania, the opposite

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<sup>1</sup> Wilds v. Hudson River R. Co., 29 N. Y. 315; 24 Id. 430; Illinois Central R. Co. v. Buckner, 28 Ill. 299.

<sup>2</sup> The plaintiff was the driver of a stage running daily on a turnpike which crossed the track of a railway company, and while driving across this track, was run down by the locomotive and train, his stage broken to pieces, and himself seriously injured. An action was thereupon brought against the railway company for negligence. On the trial it appeared that when more than 225 feet from the crossing, the plaintiff was driving unusually fast, knowing that a train was approaching, and repeatedly looking in the direction of the coming engine; that when about 110 feet from the crossing, he again looked in the same direction, then whipped up his horses, and passed with increased rapidity up an ascent in the road, to cross the track, where he was run down by the locomotive. The evidence as to the speed of the train and blowing of the whistle was conflicting. Held, that the plaintiff could not recover, as the want of ordinary care and prudence on his part contributed to the injury, which could have been avoided by the use of such care and prudence (Moore v. Central R. Co., 4 Zab. 268).

<sup>3</sup> Such suggestions are surely fine examples of judicial humor. After two or three years' litigation, the plaintiff might possibly recover damages to the amount of twenty-five cents.

<sup>4</sup> Gahagan v. Boston & Lowell R. Co., 1 Allen, 187. So in Wyatt v. Great Western

doctrine is established, and it is not deemed negligence for the plaintiff to cross by the only path left open to him.<sup>1</sup> This we consider to be the proper rule. We do not believe that the most learned judge would fail to step over the platform of a car under such circumstances; and it is absurd to call that course negligent which every sensible man would adopt.

§ 491. When a railroad is laid along a highway, travelers have the same right to walk upon it that they would have if the track was not there. If a sufficient sidewalk is provided, walking upon the track may be negligent, simply because walking in the center of an ordinary highway would be. Travelers have a right to ride or drive along the track in such cases, even though there is abundant room in other parts of the road.<sup>2</sup> But, in the exercise of this right, a traveler must use more care than he would if he were not on the track. He must give way to every approaching car, and must keep a sharp watch for its coming. If he fails to do this, he is guilty of contributory negligence.<sup>3</sup> But the use of a

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R. Co. (6 Best & S. 709), where a railway company, required by statute to have gates at level crossings, erected the gates, but provided no persons to open them, and the plaintiff coming to the crossing at night, and finding no person in attendance to open the gates, opened them himself, and was injured in consequence, it was held that he had no right of action against the company. We suppose that he was bound to stand there all night, like a horse, waiting for some superior intelligence to open the gate. Or perhaps it was his duty to walk down to London, and request the directors to send a man back with him for that purpose.

<sup>1</sup> Rauch v. Lloyd, 31 Penn. St. 358.

<sup>2</sup> Fash v. Third Av. R. Co., 1 Daly, 148; Wilbrand v. Eighth Av. R. Co., 3 Bosw. 314.

<sup>3</sup> "The true rule is that the company is entitled to the unrestricted use of its rails for the progress of its cars within that limit of speed which the law allows them; and that, as between them and the driver of any other vehicle who may be upon their track in front of one of their cars, the latter, being unnecessarily there, must exercise more care than he would if he were upon a common pavement to see that an approaching car is not impeded, and if, through negligence or willfulness on his part in this respect, a collision ensues, he should not have damages against the company, even if the latter are also in fault" (Slosson, J., Wilbrand v. Eighth Av. R. Co., 3 Bosw. 314; but compare Fettrich v. Dickenson, 22 How. Pr. 248).

railroad track, cutting, or embankment, excepting at lawful crossings of public roads or highways, is exclusively for the company and its employees;<sup>1</sup> and it is, therefore, an act of negligence to travel laterally upon it, even though it is entirely uninclosed and opens upon a highway.<sup>2</sup> Even one lawfully using a railroad laterally must exercise peculiar care, keeping constant watch for the approach of trains,<sup>3</sup> and taking every precaution which the highest reasonable caution would suggest. And a traveler who walks along the same track upon which a train is approaching in his full view is seriously in fault.<sup>4</sup>

§ 492. An animal is lawfully upon the track of a railroad, not only when it is there with the permission of the company, but also when it is under the care of a suitable person driving it to any place with ordinary care; and this whether the animal, in obedience to its driver, is crossing the track at a proper place, or driven along the track where necessary, or whether the animal has broken away from the control of its keeper, and is upon any part of the railroad, however improper, so long as the keeper

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<sup>1</sup> Philadelphia & Reading R. Co. v. Hummell, 44 Penn. St. 375.

<sup>2</sup> *Ib.*

<sup>3</sup> Thus, one driving a hand-car along a railroad must keep constant watch for the approach of trains, and cannot recover for injuries suffered through his failure to do so, even though he did not know that there was any danger (Catawissa R. Co. v. Armstrong, 49 Penn. St. 186; and see Evansville &c. R. Co. v. Hiatt, 17 Ind. 102). Where a track repairer was killed at night by the collision of a backing train of cars with a hand-car, in which he with others was approaching the station at which the train had been standing, it was held that it was error to instruct the jury, in an action for damages, that if the deceased knew that the train was at the station, he was not guilty of negligence in approaching it in a hand-car, unless he knew that the train was in motion (Catawissa R. Co. v. Armstrong, 49 Penn. St. 186).

<sup>4</sup> Thus, where the plaintiff and his father walked up a track in full view of a train approaching at the rate of about four miles an hour, and the father being overtaken by the train, the plaintiff helped him to escape, but lost his own leg in doing so, it was held (the engineer having attempted to stop the train as soon as its motion seemed to threaten danger) that the plaintiff could not recover (Evansville &c. R. Co. v. Hiatt, 17 Ind. 102).

continues in pursuit and endeavors to reclaim it.<sup>1</sup> Of course, when the track is laid upon a public highway, especially if laid along and not merely across it, an animal traveling under proper supervision is lawfully there, and the company is bound to anticipate that animals will probably be there, and to use ordinary care in view of that probability.<sup>2</sup>

§ 493. The rule stated in another place, that the defendant is liable for his want of ordinary care to avoid the consequences of the plaintiff's negligence, after he became or ought to have become aware of it,<sup>3</sup> has been illustrated by several railroad cases. Thus, where a boy lay down upon the track and fell asleep, the railroad company was held liable for his death, the engineer having seen the boy in time to stop the train, but having made no effort to do so, or to give any warning of its approach.<sup>4</sup> And where persons are in the habit of crossing the road at a particular place, though they have no right of way there, the railroad company is bound to use ordinary care to avoid injuring them.<sup>5</sup> So, where a person crosses at an improper time and place, and under circumstances of great imprudence, an engineer is nevertheless bound, upon becoming aware of his presence upon the track, to

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<sup>1</sup> See *Bowman v. Troy & Boston R. Co.*, 37 Barb. 516, 517; *Tonawanda R. Co. v. Munger*, 5 Denio, 255, 259.

<sup>2</sup> As to the duty of care in respect to the condition of the track under such circumstances, see *ante*, § 446.

<sup>3</sup> *Ante*, §§ 25, 36. See *Chicago, B. & Q. R. Co. v. Cauffman*, 38 Ill. 424.

<sup>4</sup> *East Tennessee &c. R. Co. v. St. John*, 5 Sneed, 524. The engineer testified that he mistook the boy for an old coat. In *Singleton v. Eastern Counties R. Co.* (7 C. B. [N. S.] 287), the plaintiff, a child three years and a half old, strayed upon the track. The engineer saw him, and blew the whistle, but made no effort to stop the train; and the plaintiff's leg was cut off. Yet the plaintiff was non-suited. This decision does not seem reconcilable with the principles stated, *ante*, §§ 25, 36; and we consider the views of Judge Agnew, as cited on p. 574, to be much more sound.

<sup>5</sup> *Watson, B., Barrett v. Midland R. Co.*, 1 Fost. & F. 361; see *Card v. N. Y. & Harlem R. Co.*, 50 Barb. 39.

warn him of danger, and to check the train.<sup>1</sup> So the engineer must make every reasonable effort to avoid run-

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<sup>1</sup> *Chicago, B. & Q. R. Co. v. Triplett*, 38 Ill. 482. So, where a wagon stuck in the rails, it was held that the engineer had no right to assume that it would be taken off the track before he reached it, but was bound to stop the train (*Chicago & C. R. Co. v. Hogarth*, 38 Ill. 370). A child, about five years of age, in attempting to run across a railroad between a coal train and an engine with its tender, which was following close behind the coal train, was struck by the engine and injured. Held, that the company was not answerable in damages, without proof of want of ordinary care in the engineer at the time and the place where the injury was done (*Phila. & Reading R. Co. v. Spearen*, 47 Penn. St. 300). In that case, Agnew, J., said: "Under these facts it is very clear that being where she had no right to be, and darting headlong before the engine, had she been an adult of discretion, there could be no right of recovery. But being a child, the same degree of caution would not be required of her, and the case would turn upon the conduct of those in charge of the engine which did the injury. The act of the child being the immediate cause of her own injury, it is not the remote negligence of the company we must look to, but the proximate—that is, the conduct of the engineer upon the engine at the time of the injury. Hence, the omission to whistle before crossing, or the relatively unsafe distance between the engine and the train before it, cannot determine the case. They did not contribute to the accident, and are no part of the company's neglect of duty to this particular party under the circumstances. The injury was not at the crossing, but below it, where the plaintiff had no right to be; and where there was no duty upon the engineer to suppose she would be. The engine was in full view to any one attempting to cross, and within a few feet of the train, which had already arrested the plaintiff's attention, and prevented her from crossing. The danger of crossing, just before the engine, was visible to any one possessing ordinary discretion, and those near to her saw it. She suddenly ran upon the track and was struck just as she reached it. No time was left to those upon the engine to guard against the injury. The suddenness, shortness of time, and unexpectedness of a child's appearance before the engine, made it exceedingly difficult, perhaps impossible, to avoid the injury. \* \* \* The degree of care required of the servants of the company in such a case is dependent in some measure upon the capacity of the injured party. If an adult should place himself upon the railroad where he has no right to be, but where the company is entitled to a clear track, and the benefit of the presumption, that it will not be obstructed, and should be run down, the company would be liable only for willful injury, or its counterpart, gross negligence. But if a child of tender years should do so, and suffer injury, the company would be liable for the want of ordinary care. The principle may be illustrated thus: If the engineer saw the adult in time to stop his train, but the train being in full view, and nothing to indicate to him a want of consciousness of its approach, he would not be bound to stop his train. Having the right to a clear track, he would be entitled to the presumption, that the trespasser would remove from it in time to avoid the danger, or, if he thought the person did not notice the approaching train, it would be sufficient to whistle to attract his attention without stopping. But if, instead of the adult, it were a little child upon the track, it would be the duty of the engineer to stop his train upon seeing it. The change of circumstances from the possession of capacity in the trespasser to avoid the danger, to a want of it

ning over a person unlawfully walking along the track. But he is not bound to foresee the presence of any person upon the track, even where it is open to an adjoining highway.<sup>1</sup> If he approaches a highway at such a speed as clearly to imply a willingness to inflict injury, the company will be liable even to a person negligently upon the track, though unseen by the engineer.<sup>2</sup>

§ 494. The first duty of a railroad company is to its passengers; and if an engineer is compelled to choose between risking the safety of passengers, or even of freight upon his train, and running over cattle on the track, he is justified in adopting the latter alternative.<sup>3</sup> Where, however, there is no such necessity, it is culpable negligence in the engineer, after becoming aware of the presence of cattle on the track, to go on with undiminished speed, and without blowing his whistle, or otherwise attempting to scare them off the track.<sup>4</sup> The duty of an

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would create a corresponding change of duty in the engineer. In the former case the adult, concurring in the negligence causing the disaster, is without remedy; in the latter, the child not concurring from a want of capacity, the want of ordinary care in the engineer would create liability. But if the train were upon the child before it could be seen, or if it suddenly and unexpectedly threw itself in the way of the engine, the engineer being incapable of exercising the measure of ordinary care to save it, the child would be without remedy, for the company's use of its track is lawful, and the presence of the child upon the track is unlawful."

<sup>1</sup> A railroad crossed two highways within a short distance from each other; and the whole ground was left open. A child, seven years of age, walked down the track from one highway toward another. While on his way, he became entangled in the cars so that his leg was crushed. Held, that admitting that the carelessness of the infant would not bar his recovery, yet the defendant was not bound to foresee that any one would be on the track, and therefore was not bound to make signals or check the train (*Philadelphia & Reading R. Co. v. Hummel*, 44 Penn. St. 375; but see *Card v. N. Y. & Harlem R. Co.*, 50 Barb. 39).

<sup>2</sup> *Lafayette &c. R. Co. v. Adams*, 26 Ind. 76.

<sup>3</sup> *Louisville &c. R. Co. v. Ballard*, 2 Metc. [Ky.] 177.

<sup>4</sup> *Aycock v. Wilmington &c. R. Co.*, 6 Jones [N. C.] Law, 231. Where such precautions had been taken in vain, and the animal refused even to be driven off by a man upon the road, the company was exonerated (*Montgomery v. Wilmington &c. R. Co.*, 6 Jones [N. C.] Law, 464).

engineer, when a human being is upon the track, is not so clear. If it appears probable that there is no choice except between sacrificing the life of the person on the track, and putting the lives of passengers, or even the persons in charge of the train, in imminent peril, the former alternative may justly be adopted ; but it is difficult to conceive of such a case, and it must be made very clear in order to justify the deliberate sacrifice of human life.



## CHAPTER XXVIII.

### REAL PROPERTY.

- Sec. 495. Obligation of owner of real property.
- 496. Owner's liberty in use of premises.
- 497. Degree of care required ; interference with lateral support.
- 498. Liability for unsafe condition of land.
- 499. Liability to person entering under bare license.
- 499 *a*. Liability to invited guest.
- 500. Only proper use of land to be provided for.
- 501. Landlord or lessor, how far liable.
- 502. What will relieve owner from liability.
- 503. Landlord not liable to tenant's guest as such.
- 504. Liability of lessee of land.
- 505. Liability to persons falling into excavations.
- 506. Management of mines.
- 507. Liability for condition of unfinished buildings.
- 508. Management of trap-doors, hoistways, &c.
- 509. Management of traps, spring-guns, &c.
- 510. Management of artificial collections of water-drains, &c.
- 511. Dripping water.
- 512. Liability of landlord for defective plumbing.
- 513. Liability of tenants of upper floors for leakage of water.
- 514. Liability, where landlord and tenant are both in fault.

§ 495. The owner of real property is not liable for injuries resulting from its nature, condition, or use, upon any different principle, or to any greater extent, than the owner of personal property.<sup>1</sup> He is, therefore, not responsible for injuries arising out of the way in which his property is used by others, who are not his servants or part of his family, unless perhaps when the act done amounts to a nuisance, which he has not taken care to prevent, and which it was his duty to have prevented, whether occasioned by his servants or others.<sup>2</sup>

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<sup>1</sup> *Reedie v. London & Northwestern R. Co.*, 4 Exch. 244.

<sup>2</sup> *Ib.* ; *Earle v. Hall*, 2 Metc. 353.

§ 496. Every man may use his own land for all the purposes to which such lands are usually applied, without being answerable for the consequences, provided he exercises proper care and skill to prevent any unnecessary injury to the adjacent land-owner,<sup>1</sup> subject, however, to the right of lateral support which all land has, in its natural state, from the adjoining land,<sup>2</sup> and to such further right of support as may be given by contract or by special circumstances,<sup>3</sup> the limits of which it is the office of treatises upon real property to define. It is not, therefore, necessarily, negligence on the part of a land-owner to make a use of his land which inevitably produces loss to his neighbor; for as he may willfully adopt such a course, and yet not be a wrong-doer, much less is he liable for unintentionally doing that which he has a right to do intentionally.

§ 497. But in exercising his rights over his land, the owner is bound to use ordinary care and skill for the purpose of avoiding injury to his neighbor. Thus, while as a general rule, he is not bound to continue the support which his land gives to a structure upon, or other artificial arrangement of, adjoining land, and is, therefore, not liable for the natural consequences of his withdrawing this support,<sup>4</sup> yet, in doing so, he must act with such care

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<sup>1</sup> Radcliff v. Mayor &c. of Brooklyn, 4 N. Y. 195; Pantou v. Holland, 17 Johns. 92.

<sup>2</sup> A owner of land has not a right, by excavating upon his own soil, to remove the natural support which his land should afford to the land of an adjoining owner; especially where his excavations are not for ordinary purposes of improvement or building, but for using the soil removed (Farrand v. Marshall, 21 Barb. 409; S. C., 19 Id. 380; Thurston v. Hancock, 12 Mass. 220; Foley v. Wyeth, 2 Allen, 131; Brown v. Robins, 4 Hurlst. & N. 186; Smart v. Morton, 5 El. & B. 30).

<sup>3</sup> Ancient buildings, and those which were granted by the owner of the lot on which the excavation is made, or by those from whom he derives title, appear to be entitled to the lateral support of the adjoining land (Lasala v. Holbrook, 4 Paige, 169; and see Elliott v. Northeastern R. Co., 10 H. L. Cas. 333; Rogers v. Taylor, 2 Hurlst. & N. 828).

<sup>4</sup> A land-owner cannot maintain an action against an adjoining proprietor to re-

and caution that (as nearly as by reasonable exertion it is possible to secure such a result) his neighbor shall suffer no more injury than would have accrued if the structure had been put where it is, without ever having had the support of his land.<sup>1</sup> Therefore, one who digs away land which affords support to an adjoining house, ought to give the owner reasonable notice of his intention to do so, and must allow the latter all reasonable facilities for obtaining artificial support, including a temporary privilege of shoring up the house by supports based upon the former owner's land. And he is absolutely responsible for any act of his own, or of his servants under his actual or ostensible authority, which results in casting any part of his property upon the land of a stranger, even though he has used all possible care to

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cover damages to a building occasioned by the latter excavating on his own land. A land-owner is entitled to have his land protected and supported in its natural condition by the adjoining land, but he cannot claim support for an artificial structure which increases the lateral pressure (*Panton v. Holland*, 17 Johns. 92; *Beard v. Murphy*, 37 Verm. 99). In England, the rule is that no structure less than twenty years old is entitled to such support (*Wyatt v. Harrison*, 3 B. & Ad. 871; *Partridge v. Scott*, 3 Mees. & W. 220; and see *Allaway v. Wagstaff*, 4 Hurlst. & N. 681). A structure of that age is so entitled (*Hide v. Thornborough*, 2 Carr. & K. 250). Where A. built a house on his own land, within two feet of his boundary line, and ten years after the adjoining owner dug down his own land so deep as to endanger the house, and A. left it for that reason, and took it down, it was held that he could not maintain an action for the damage to the house, but that he was entitled to damage caused by the falling of his natural soil into the excavation so made (*Thurston v. Hancock*, 12 Mass. 220; *Runnels v. Bullen*, 2 N. H. 532). A. dug a well near B.'s land, which sank in consequence, and a building erected on it within twenty years fell. It was proved that if the building had not existed, the land would still have sunk, but the damage would have been inappreciable. Held, that B. had no cause of action against A. (*Smith v. Thackerah*, Law Rep. 1 C. P. 564). But where the plaintiff's land would have fallen, and caused him real damage, even had there been no house on it, he may recover for the damage done to the house as well as to the land (*Brown v. Robins*, 4 Hurlst. & N. 186).

<sup>1</sup> This seems to be the proper test, though not clearly set forth in the cases. In *Trower v. Chadwick* (3 Bing. N.C. 334; S. C., 3 Scott, 699), it was held to be a good ground of action that the defendant conducted himself so negligently and unskillfully in pulling down his own wall, as by reason thereof to injure his neighbor's. So an action lies against one who, by negligence in excavating his own ground, either causes or accelerates the fall of an adjoining house (*Dodd v. Holme*, 1 Ad. & El. 493; see *Haines v. Roberts*, 7 El. & Bl. 625).

avoid such a consequence; inasmuch as the mere entry of his property upon that of another, by his act, is a trespass.<sup>1</sup>

§ 498. The owner or occupant of real property, so far as the use of ordinary care and vigilance will enable him to do so, is bound to keep it in such condition that it will not, by any insecurity or insufficiency for the purpose to which it is put, injure any adjoining owner or occupant,<sup>2</sup> or any person passing the premises by virtue of a right, and not under a bare license.<sup>3</sup> He is bound, also, to use ordinary

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<sup>1</sup> The owner of land is liable for damages caused by the fall of earth and stones on adjoining land, in consequence of blasting on his own, although neither want of care or negligence is alleged or proved, for the reason that the owner of land is limited in his use of it, by the rights of others to the lawful possession of theirs (*Hay v. Cohoes Co.*, 2 N. Y. 159; affirming S. C., 3 Barb. 42; *Tremain v. Cohoes Co.*, 2 N. Y. 163; *Gourdier v. Cormack*, 2 E. D. Smith, 200). Where the defendant permitted another person to remove earth from a hill on defendant's land, and it was so negligently done that earth slid from the hill upon plaintiff's land,—held, that defendant was liable therefor. It is a general principle of the common law, that the owner of premises is bound so to control the use of them as not to produce injury to others; and if he permits another to place his premises in such a situation as to cause an injury, he will be answerable (*Gardner v. Hearst*, 2 Barb. 165). This case was reversed on appeal, upon another ground (1 N. Y. 528). The original decision being partly based upon the now obsolete case of *Bush v. Steinman* (1 Bos. & P. 404), its authority is doubtful.

<sup>2</sup> In *Cleghorn v. Taylor* (18 Dunlop, 664), damage was done to an adjoining property by a chimney-can falling from the defendants' house, which had been put up in an insecure manner. The defendants argued that, there having been no personal fault on their part, and skilled workmen having been employed, they were not liable for injuries caused by the insufficiency of the work. The court held the proprietor liable. In such case, the tenant of the premises trespassed upon may have an action for the injury to his possession, as well as may the reversioner, under the statute, for the injury to the reversion (*Gourdier v. Cormack*, 2 E. D. Smith, 200; *Hardrop v. Gallagher*, Id. 523).

<sup>3</sup> The defendants were possessed of a wharf, in front of which the earth below water was excavated, and the soil beyond was supported by piles erected by a previous owner of the wharf. These piles were out of repair, and by reason thereof the plaintiff's barge was injured. Held, that the defendants were liable (*White v. Phillips*, 15 C. B. [N. S.] 245; see *Bartlett v. Baker*, 3 Hurlst. & C. 153). Where the walls of a church edifice belonging to a religious corporation were negligently permitted to stand after the rest of the building had been destroyed by fire, and a part of the wall afterward fell upon a person while passing along the street, held, that the corporation was liable to respond in damages for the injury (*Church of the Ascension v. Buck-*

care and diligence to keep the premises in a safe condition for the access of persons who come thereon by his invitation, express or implied, for the transaction of business,<sup>1</sup> or for any other purpose beneficial to him; or, if his premises are in any respect dangerous, he must give such visitors sufficient warning of the danger to enable them, by the use of ordinary care, to avoid it.<sup>2</sup> This rule is especially applicable to an owner of real property who receives compensation for its use, as, for example, in the case of a wharf-owner who receives payment for the use of his wharf. And, in such cases, persons using the property in the manner in which it was intended to be used, have a right to

hart, 3 Hill, 193; and see *Seabrook v. Hecker*, 2 Robertson, 291; *Schell v. Second Nat. Bank*, 14 Minn. 43; *Schwartz v. Gilmore*, 45 Ill. 455).

<sup>1</sup> *Chapman v. Rothwell*, El. Bl. & E. 168; *Carleton v. Franconia Iron &c. Co.*, 99 Mass. 216; see *Smith v. London & St. Katharine's Docks Co.*, Law Rep. 3 C. P. 326; *Holmes v. Northeastern R. Co.*, Law Rep. 4 Exch. 254; *Freer v. Cameron*, 4 Rich. Law, 224. See, as to the liability of the keeper of a tavern to persons coming there without dealing with him, *Axford v. Prior*, 14 Weekly Rep. 611.

<sup>2</sup> The defendant agreed with D. for the setting up of gas regulators in his sugar refinery. The contract stipulated that they were not to remain unless a certain saving was effected, and that this should be tested. In order to do so it was necessary to examine the burners; and D.'s manager and the plaintiff, as his servant, went to the sugar refinery for that purpose. In the refinery there was a shaft for raising and lowering sugar, and necessary, usual, and proper for the business. This shaft was unfenced, though when out of use it might have been fenced round. The plaintiff was warned by D.'s manager that the place was dangerous, and lights not allowed, and that he should keep by a man who would have a light; but having left a tool in a part of the refinery where he had been, he went back for it, and in returning to the man with the light, fell through the shaft, without any fault on his part. Held, that where a person resorts to a building in the course of business on the express or implied invitation of the occupier, such person, using reasonable care, is entitled to expect the occupier to use reasonable care to prevent damage from unusual danger which he knows, or ought to know; that where there is evidence of neglect, it is a question for the jury; and that in this case there was evidence for the jury that the plaintiff was on the defendant's premises on business by tacit invitation, that the shaft was an unusual danger known to the defendant, and that damage accrued to the plaintiff from the defendant and his servants not using sufficient means to avert and warn him of it (*Indermaur v. Dames*, Law Rep. 2 C. P. 311; affirming S. C., 1 Id. 274). But where, ingoing along a dark passage, the plaintiff fell down an ordinary staircase, it was held that he could not recover, as he ought to have taken a light with him (*Wilkinson v. Fairrie*, 1 Hurlst. & C. 633). Nor could the fact that the defendant's servant directed the plaintiff to go where he did, make any difference (*Ib.*)

presume that it is in a fit condition for such use, and are not guilty of contributory negligence in failing to anticipate and protect themselves against defects in the property, of which they were not warned.<sup>1</sup>

§ 499. A mere passive acquiescence on the part of the owner or occupant in the use of real property by others, does not involve him in any liability to them for its unfitness for such use.<sup>2</sup> They take all risks upon themselves, and have no right to complain of any defect in the premises, even though caused by the direct act of the owner (*e. g.*, a pit sunk in the land<sup>3</sup>), unless the act is malicious, or is committed with notice of the fact that strangers are

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<sup>1</sup> The corporation of Pittsburgh, having charge of a wharf therein, and receiving tolls for its use, permitted piles of iron to remain thereon for a longer time and nearer the water's edge than was allowed by the city ordinances. Soon after the plaintiff's boat had anchored at the wharf, the water rose rapidly and high, carrying the boat further inland; it then fell, and in order to avoid one of the piles of iron, the boat was necessarily conducted further into the stream than the line of boats at the wharf above and below. While in this position, in the night, it struck on one of the piles of iron and sunk. Held, that the owners could recover its value from the city (*Pittsburg v. Grier*, 22 Penn. St. 54). It was not material that the city authorities did not foresee the danger as likely to occur (*Ib.*) The parties in this case were not in the position of persons equally in fault. Though both parties had an equal opportunity of seeing the danger, they were not bound to equal degrees of vigilance. The city was responsible for extreme care of the wharf; the owners of the boat only for that common prudence which would keep it clear of a manifest peril (*Ib.*)

<sup>2</sup> *Nicholson v. Erie R. Co.*, 41 N. Y. 525; *Sweeny v. Old Colony R. Co.*, 10 Allen, 368; *Zoebis v. Tarbell*, *Id.* 385; *Gautret v. Egerton*, Law Rep. 2 C. P. 371; *Gillis v. Pennsylvania R. Co.*, 59 Penn. St. 129; *Hounsell v. Smyth*, 7 C. B. [N. S.] 731. See on the same point, in respect to personal property, *Lygo v. Newbold*, 9 Exch. 302. Thus, where a sign of "no admittance" is placed on a door, one who enters the room (being of the class meant to be excluded) cannot recover for injuries caused by negligence in the management of the room, even though no attempt was made to exclude him, nor any further warning given (*Zoebis v. Tarbell*, 10 Allen, 385). So it was held that a railroad company was not bound to keep its road in a state fit for passengers to walk upon at a distance of 100 feet from the station; at any rate, not in favor of a passenger destined for another station (*Frost v. Grand Trunk R. Co.*, 10 Allen, 387). And where people in general were in the habit of crossing a railroad, without objection, it was held that the railroad company was not bound to secure its cars so as to prevent their accidentally injuring such passers-by (*Nicholson v. Erie R. Co.*, 41 N. Y. 525).

<sup>3</sup> *Knight v. Abert*, 6 Penn. St. 472; see § 505, *post*; *Roulston v. Clark*, 8 E. D. Smith, 366.

likely to approach, and without any effort to warn them of the danger, under circumstances which justify a belief that the owner was indifferent to the injuries which might happen to them.

§ 499 a. The precise ground and degree of liability of a land-owner to an invited guest, having no business relations with him, are not yet thoroughly settled. Chief Baron Pollock, with whom it was a favorite notion that all members of a family were subject to the rule which restricts the right of a servant to recover from his master for injuries caused by negligence,<sup>1</sup> held that a guest also fell within this rule, and could not recover from his host for an injury caused by a defect in the construction of the house, although owing to the negligence of the host. Baron Alderson concurred in this view. Baron Bramwell held that the host was liable for any misfeasance, but not for mere nonfeasance.<sup>2</sup> But we are not satisfied with either theory. No attempt was made to sustain either by any process of reasoning; and we cannot see how any satisfactory reasons could be assigned. In our judgment, the same rule should be applied in such a case that would be applied if the property were personal instead of real: the host should be held responsible to the guest for gross negligence<sup>3</sup>—that is, for such want of care as would justify the belief that he was indifferent to the safety of his guest. One who receives a visitor for purposes of mutual benefit should be held responsible for ordinary negligence; and one who, for his own benefit only, invites another upon his premises, should

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<sup>1</sup> See *Abraham v. Reynolds*, 5 Hurlst. & N. 143.

<sup>2</sup> *Southcote v. Stanley*, 1 Hurlst. & N. 247. To the contrary, see *Sweeny v. Old Colony R. Co.*, 10 Allen, 368.

<sup>3</sup> This is familiar law with regard to persons riding over railroads without paying fare (*Phila. & Reading R. Co. v. Derby*, 14 How. [U. S.] 468; *Nolton v. Western R. Co.*, 15 N. Y. 444; *Bissell v. Michigan Southern R. Co.*, 22 N. Y. 258, 308).

be held liable for even slight negligence in respect to the condition of the property.

§ 500. The owner or occupant is not bound to make the land, or buildings thereon, safe for any purpose which is unlawful or improper, or for which he could not reasonably anticipate that it would be used. He is not responsible for the consequences of the use of his property in a mode for which it was obviously never designed, even though such use was intended for his benefit. Thus, where a house-painter fastened the staging upon which he stood to the cornice of the house which he was employed to paint, and the cornice gave way, causing severe injuries to him, it was held that he could not recover compensation from the owner of the house, especially in the absence of proof that the latter knew of the insufficiency of the cornice to bear the strain.<sup>1</sup>

§ 501. The owner of property, either real or personal, who lets or lends it, and transfers the entire possession and control of the property to the hirer, is not responsible for defects subsequently arising therein,<sup>2</sup> much less for any

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<sup>1</sup> *Fanjoy v. Seales*, 29 Cal. 243.

<sup>2</sup> *Taylor v. Mayor &c. of N. Y.*, 4 E. D. Smith, 559. Thus, in *Cheetham v. Hampson* (4 T. R. 318), it was held that the landlord was not liable to a stranger for the non-repair of fences. So in *Mayor &c. of N. Y. v. Corlies* (2 Sandf. 301), the landlord was held not liable for a penalty imposed for the overflow of a sink, the house being in the exclusive possession of a tenant. And a bridge having been leased, it was held that the lessor was not liable to prosecution for its non-repair (*Regina v. Buckrall*, 2 Ld. Raym. 804). So, also, where a railroad company permitted another company to lay tracks over a bridge, by the side of its own, and the latter company doing so, left a hole in the bridge, between its own tracks, through which the plaintiff fell, it was held that the former company was not liable for the injury (*Gwathney v. Little Miami R. Co.*, 12 Ohio St. 92). But in *Allan v. Mack* (Hay, 45; 10 S. D. 349), a lessor was held liable for injuries suffered in consequence of the lessee's having opened and negligently kept a pit in the land. In *Pickard v. Collins* (23 Barb. 444), it was said that if an owner so constructed and adapted a building that in its ordinary use it would be injurious and offensive to a neighbor, and cast unwholesome odors into his house, the owner would be liable for the nuisance thus caused by his tenants. But if it proved a nuisance by reason of a special, unusual circumstance—*e. g.* water in the cellar—the owner would not be liable for the nuisance, unless he knew, or had reason



wrongful use or mismanagement of the property by the hirer.<sup>1</sup>

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to believe, when he let the building, that the use of it in the ordinary mode would prove a nuisance. A. leased to B., for thirty years, a house with an area in front, in which was a water-tank, B. covenanting to do the repairs, and A. reserving a right of re-entry in default of payment of rent. B. underlet the house to different lodgers, giving them all an easement to draw water from the tank, but nothing further; he then went into insolvency, owing two quarters' rent, gave up the lease to the official assignee, and against A.'s opposition, obtained his discharge. A. then notified the lodgers to pay rent to him. Two of them had already done so, when the plaintiff fell through the grating into the area and was injured. A day or two after, the first-floor lodger was notified by the inspector of nuisances to repair the grating; he handed the notice to A., who repaired it at his own sole expense. Afterward, by an order from the insolvency court, the lease, which had been repudiated by the official assignee, was delivered to A. In a suit against A. to recover damages for the injury, it was held that this was no evidence to go to the jury, that A. was responsible for the negligence which caused the injury (*Bishop v. Trustees of Bedford Charity*, 1 Ellis & E. 697).

<sup>1</sup> *Sargent v. Stark*, 12 N. H. 332; *Fiske v. Framingham Mfg. Co.*, 14 Pick. 491. Thus, where a ferry was leased for a definite period to a person who assumed its entire control, it was held that the lessor was not responsible to passengers for injuries caused by the negligence of the lessee's servants (*Norton v. Wiswall*, 26 Barb. 618). The lessor of a mill with water-power is not liable for the act of a lessee in excavating the bed of the river so as to damage a neighboring mill-owner (*Stickney v. Munroe*, 44 Maine, 195). The lessor of premises offensively used as a livery stable is not liable in damages, unless when he demised the premises he had reason to believe that the business would be a nuisance (*Morris v. Brower*, Anth. N. P. 368). In *Weston v. Incorporation of Tailors of Potterrow* (Hay, 66; 14 F. C. 1232), an action was brought against the proprietor of a tenement in Edinburgh for damage occasioned to the tenant of the lower flat by an overflow of water caused by an improper or careless use of the water-closet. In charging the jury, Lord Meadowbank said: "I therefore lay it down in law, that if any thing has been done whereby damage has been created to the tenant of the inferior tenement, through the fault or negligence of the tenant of the upper, it must be held that it was done by him acting for behoof of the proprietors of the latter, under the implied authority from them; in fact, he was placed there as their representative, and it must be held that the act was done for their behoof." The jury found for the pursuer, but an exception being taken to the charge, the court above allowed the exception, and set aside the verdict, saying, "I cannot agree in thinking that this erection carries nuisance on the face of it. If it is constructed in the ordinary manner, and not so as necessarily, or in extreme probability, to occasion damage from its ordinary use, there is no farther liability on the landlord. But if, by neglect, or by what does sometimes occur, viz., mischievous practices on the part of the tenant or his family, damage does occur, it is not the landlord, but the tenant, who is liable. To suppose that the landlord undertakes for the faithful use of this apparatus, I can find no principle of law whatever."

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§ 502. But a mere lease of profits arising out of property does not relieve the owner from liability for its non-repair. Nothing, it would seem, short of a surrender of possession can have that effect, even though the hirer covenants to repair.<sup>1</sup> Nor does even the entire surrender of control over a thing to a hirer or borrower relieve the owner from liability to third persons for defects which existed in it when he parted with its control.<sup>2</sup> Nor yet would he be protected by a contract on the part of the hirer to repair such defects, for the mere relation of letter and hirer has no quality which enables the letter to evade responsibility for his own acts, by referring persons injured thereby to a third party for relief. It would obviously be no excuse for the want of necessary repairs, whereby an innocent person had been injured, to show that a contract had been made with a carpenter to execute the needful repairs; and the principle applies with equal force to a contract made with a hirer of the thing.<sup>3</sup> And if the owner covenants with the hirer to repair, he is liable to third persons for the want of repair, notwithstanding he has given up the entire possession of the property.<sup>4</sup>

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<sup>1</sup> Taylor v. Mayor &c. of N. Y., 4 E. D. Smith, 559.

<sup>2</sup> Moody v. Mayor &c. of N. Y., 43 Barb. 282; Davenport v. Ruckman, 10 Bosw. 20, 37; 16 Abb. Pr. 341; affirmed, 37 N. Y. 568; Anderson v. Dickie, 1 Robertson, 238; 26 How. Pr. 105; Fish v. Dodge, 4 Denio, 311; Rosewell v. Prior, 2 Salk. 460; per Peckham, J., Benson v. Saurez, 43 Barb. 408; 19 Abb. Pr. 61; per Buller, J., Cheetham v. Hampson, 4 T. R. 318. The defendant constructed a sewer through property owned and occupied by himself, which was not made with proper care. Subsequently he leased the premises to the plaintiff, and afterward the sewer burst, damaging the plaintiff's property. Held, that upon the letting of the premises to the plaintiff, a duty arose on the part of the defendant to take care that that which was before rightful did not become wrongful to the plaintiff, because that would be in derogation of the defendant's own demise to the plaintiff; and that upon this ground, as also upon the principle *sic utere tuo ut alienum non ledas*, an action could be maintained (Alston v. Grant, 3 El. & B. 128).

<sup>3</sup> See *ante*, § 20.

<sup>4</sup> Benson v. Suarez, 43 Barb. 408; 19 Abb. Pr. 61; Payne v. Rogers, 2 H. Blacks. 350.

§ 503. The liability of the landlord, however, exists only in favor of persons who stand strictly upon the rights as strangers. Those who claim upon the ground that they were invited into a dangerous place must seek their remedy against the person who invited them. If they are the guests of the tenant, he, and not the landlord, is the person from whom they must seek redress for injuries caused by any defects in the premises, even though the defects existed when the lease was made :<sup>1</sup> for such persons would never have suffered any injury from these defects if they had not entered the premises ; and this entry was not made at the request of the landlord or any agent of his. The general rule before stated, therefore, does not extend to this case.<sup>2</sup>

§ 504. The hirer or borrower of a thing is not responsible to strangers for defects which existed in it when he took possession of it,<sup>3</sup> unless they amount to a nuisance, or he does something equivalent to a ratification of the act which caused them to exist.<sup>4</sup> But after becoming aware of a defect in the thing which he has hired, he must use such increased care as the defective nature of the thing

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<sup>1</sup> " A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents " (per Erle, C. J., *Robbins v. Jones*, 15 C. B. [N. S.] 221, 240). But in *Godley v. Hagerty* (20 Penn. St. 387), it was held that where a man erects a building to rent, and knows that there are defects in it which unfit it for the use to which the lessee intends to put it, his lease not stipulating against its being used for such purpose, and while thus being used, it suddenly falls, and injures a laborer employed therein who was guilty of no carelessness, the landlord is liable for the injury.

<sup>2</sup> *Ante*, § 498.

<sup>3</sup> *Eakin v. Brown*, 1 E. D. Smith, 36.

<sup>4</sup> Thus, where an excavation had been made in the highway fronting a house, before it was leased to the defendant, and he used such excavation as a means of access to the house, this was held sufficient to justify a finding that he had adopted the act of the landlord in making the excavation, and was liable for its defects (*Davenport v. Ruckman*, 10 Bosw. 30, 37). So both landlord and tenant are responsible to passers-by for defects in an area or other opening in the highway (*Ib.* ; *Durant v. Palmer*, 5 Dutch. 544).

requires, and cannot excuse himself for the want of such care by the plea that he was not responsible for the defect itself. Thus, if a house should be let with a defective faucet, a tenant would not be liable for the consequences of the defect, unmingled with negligence on his part; but if, by using the faucet in the same manner as if it were perfect, while knowing that it was not, he should injure any one, he would be answerable for the consequences. And if by his own negligence he makes the property an occasion of injury to others, he cannot avail himself as a defense of a covenant on the part of the landlord, or of any other person, to repair the defects caused by his fault.<sup>1</sup> As already stated,<sup>2</sup> the tenant or hirer is liable (to the same extent as if he were the owner)<sup>3</sup> to persons whom he invites to use the property, for injuries suffered by them from defects in it existing when he took possession of it, or at any time afterward, while in his possession,<sup>4</sup> and the landlord or letter is not. And any one who by his culpable negligence in excavating land, or otherwise, injures another, is liable for the injury, whether he had any right to the land or not.<sup>5</sup>

§ 505. The occupant of land is under no obligation to strangers to place guards around excavations made by him, unless such excavations are so near a public way as to be dangerous, under ordinary circumstances, to persons passing upon the way, and using ordinary care to keep upon the proper path, in which case he must take reasonable precautions to prevent injuries happening therefrom to

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<sup>1</sup> See *Pickard v. Smith*, 10 C. B. [N. S.] 470.

<sup>2</sup> See *ante*, § 503.

<sup>3</sup> See §§ 498, 499 *a*.

<sup>4</sup> See anonymous case, cited by Bramwell, B., in *Corrman v. Eastern Counties R. Co.*, 4 Hurlst. & N. 781, 785.

<sup>5</sup> *Bibby v. Carter*, 4 Hurlst. & N. 153; *Race v. Minn. Valley R. Co.*, 13 Minn. 442.

such persons. Where the excavation is at a considerable distance from the public path, there can be no question that the owner or occupant is not liable to a mere stranger falling therein, whether consciously<sup>1</sup> or unconsciously<sup>2</sup> off the path. But it does not seem so easy to say that a deep excavation may be properly left unfenced and unguarded within a few feet of a public way. Nevertheless, it has been decided that such an excavation, made within twenty-four feet of the highway, need not be guarded or separated in any manner from the road, and that one who in the night strayed into the excavation, without any fault of his own, could not recover damages;<sup>3</sup> and the same ruling was made in a Massachusetts case where the excavation was only one or two feet from the road;<sup>4</sup> but this is a decision which it is difficult to justify. Indeed, in a case of much better authority, it was held that one making an excavation adjoining a public way, though it could not be dangerous to one who kept strictly in the road, was yet liable to one who accidentally deviated a little from the road, and fell into the excavation.<sup>5</sup> The general result of the decisions is best expressed in the rule that we have already stated. Of course it is culpable negligence to leave a pit or other excavation in such an unguarded state as to cause injury to a person having a right to be upon the land, and using that right with ordinary care.<sup>6</sup>

§ 506. Where mines are dug in land, the whole of which belongs to the miner or his landlord, the ordinary

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<sup>1</sup> *Blyth v. Topham*, Cro. Jac. 158; *Knight v. Abert*, 6 Penn. St. 472.

<sup>2</sup> *Hounsell v. Smyth*, 7 C. B. [N. S.] 731.

<sup>3</sup> *Hardcastle v. South Yorkshire R. Co.*, 4 Hurlst. & N. 67; *Binks v. South Yorkshire R. Co.*, 3 Best & S. 244. Compare *Wetter v. Dunk*, 4 Fost. & F. 298.

<sup>4</sup> *Howland v. Vincent*, 10 Metc. 371.

<sup>5</sup> *Barnes v. Ward*, 9 C. B. 392.

<sup>6</sup> *Williams v. Groucott*, 4 Best & S. 149.

rules concerning excavations of course apply ; but where, as is often the case, the title to the surface of land is in one person, and the title to the minerals underneath the surface is in another, together with the right to excavate for and remove them, the case is obviously different. Unless there is some peculiar law or contract affecting the rights of the parties, the miner is in such case absolutely bound to leave sufficient support to the surface to prevent it, while in a natural state, from falling in ;<sup>1</sup> and for any injury done to the surface-owner by the decadence of the land in consequence of the mining operations, the miner is responsible, notwithstanding he may have used the utmost care.<sup>2</sup> It does not appear to have been yet decided whether the surface-owner has a similar right to support for buildings erected by him upon the land ; but we think he should have.<sup>3</sup> The miner is undoubtedly liable for damage done to such buildings by his negligence. Where the title of both parties was founded upon a statute, allowing the miner to excavate to any extent, provided he paid for "all surface damage," it has been held that damage to a house built on the surface was not included in his liability.<sup>4</sup> A miner is negligent if he omits to place guards around a pit or shaft sunk by him, if he excavates nearer to the surface than experience has shown to be safe, and leaves no support for it, natural or artificial, if he blasts rock in such manner as unnecessarily to shake buildings on the surface or on adjoining lands, and generally if he omits any precaution which is reasonably necessary to prevent injury.

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<sup>1</sup> Haines v. Roberts, 7 El. & Bl. 425 ; Humphries v. Brogden, 12 Q. B. 739 ; Harris v. Ryding, 5 Mees. & W. 60.

<sup>2</sup> Haines v. Roberts ; Humphries v. Brogden, *supra*.

<sup>3</sup> See Hilton v. Granville, 5 Q. B. 701 ; Hilton v. Whitehead, 12 Q. B. 734.

<sup>4</sup> Allaway v. Wagstaff, 4 Hurlst. & N. 681.

§ 507. The owner of an unfinished building does not, by leaving it open and uninclosed, give any permission, much less any invitation, for the entry of strangers. He is therefore under no obligation to make it safe for their access.<sup>1</sup> If the building is erected in front of land occupied by persons for whom he is bound to provide a private way, and they and their visitors have been accustomed to pass over the land on which he is building, it is sufficient for him to warn such occupants, and provide a sufficient way for them. After doing so, he will not be liable for injuries suffered by a visitor to the rear occupants, in consequence of taking the old way; and this, even though such visitor had no other notice than the existence of the building in his path.<sup>2</sup>

§ 508. Trap-doors, hoistways, and similar openings in floors, are a usual and necessary part of the machinery of business in most warehouses and manufactories; and the mere fact of their existence and use is no evidence of negligence. But such openings ought to be either far removed from those parts of the building which are lawfully used by persons not having actual notice of their existence, or should be thoroughly fenced in, so that no one exercising ordinary prudence could fall through them. If it is impracticable to keep up a fence, as it sometimes is, for example, during the hoisting and delivery of goods through a hoistway, the person using it is bound to give actual notice of the danger to every person lawfully approaching the place, or, in default thereof, to answer for all injuries resulting therefrom.<sup>3</sup> So, where a cellar door is opened by

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<sup>1</sup> Roulston v. Clark, 3 E. D. Smith, 366; Castle v. Parker, 18 Law Times [N. S.] 367.

<sup>2</sup> Roulston v. Clark, *supra*.

<sup>3</sup> The plaintiff was in the store of defendant as a customer: a clerk invited her to walk into a dark part of the store, in which there was an open trap-door, through which she fell, without negligence on her part, and broke her arm. Held, that the

a tenant, making a gap in the path of one lawfully passing, who, for want of any guard or warning, falls into the cellar, the tenant is liable for the injury.<sup>1</sup>

§ 509. Traps, spring-guns, and other dangerous instruments may be lawfully placed on private grounds, for the purpose of deterring trespassers or catching strange animals doing damage.<sup>2</sup> But one who uses such instruments of this kind as endanger human life, must give public notice of the fact, in such way as to bring it to the knowledge of every one who uses reasonable care in approaching the land. And, whatever may be the law in England, we have little doubt that in America it would be held unlawful to place such instruments in land which is not thoroughly fenced in. Where no notice, or insufficient notice, is given, the person placing such traps is responsible for all injuries done by them to any human being, even though he be a trespasser.<sup>3</sup> Where the trap injures animals only, notice

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defendant was liable (*Freer v. Cameron*, 4 Rich. Law, 218; see *Chapman v. Rothwell*, El. Bl. & El. 168). In *Karl v. Maillard* (3 Bosw. 591) it was held culpable negligence to have an open, unguarded hoistway within six feet of the entrance to the building. And see two anonymous cases, cited by Bramwell, B., in *Cornman v. Eastern Counties R. Co.*, 4 Hurlst. & N. 781.

<sup>1</sup> *Pickard v. Smith*, 10 C. B. [N. S.] 470.

<sup>2</sup> The defendant was the owner of a large wood, in which he had set a number of spring-guns. The plaintiff, with a companion, was out gathering nuts, in the day-time, and proposed to his companion to enter this wood. His companion at first refused, telling him that spring-guns were set there, but they afterward concluded to enter the wood; and while there, the plaintiff trod on a wire connecting with one of the guns, and was badly injured. Held, that the action could not be maintained. Bayley, J., said: "He voluntarily exposes himself to the mischief which has happened. He is told that if he goes into the wood, he will run a particular risk, for that in those grounds there are spring-guns. Notwithstanding that caution, he says, I will go into the wood, and I will run the risk of all consequences. Has he then any right, after he has been distinctly apprised of his danger, to bring an action against the owner of the soil for the consequences of his own imprudent and unlawful act? I think not, for he had no right to enter the wood; and in so doing he became a trespasser and a wrong-doer" (*Hott v. Wilkes*, 3 Barn. & Ald. 304).

<sup>3</sup> Where the defendant, for the protection of his property, some of which had been stolen, set a spring-gun, without notice, in a garden completely walled round, and at a distance from his house, and the plaintiff, who had climbed over the wall in



seems to be held unnecessary to justify it against the owner of an animal committing a trespass ; and it has been distinctly held that such a trap may be placed on ground not fenced in.<sup>1</sup> But a land-owner has no right to place a bait for animals, so as to tempt them into his traps ; and if he does so, he must answer for the consequences, even to the owner of trespassing animals.<sup>2</sup>

§ 510. One who keeps water on his land, otherwise than in a purely natural state, is liable for any injury caused by his want of proper care in bringing or keeping it on, or letting it off his premises. If the circumstances are such as to make it probable that he cannot control it after bringing it upon his land, he will be liable for any damage that it may do, in flowing upon other land, notwithstanding any efforts which he may make to restrain it.<sup>3</sup> So, if

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pursuit of a strayed fowl, was held, shot, that the defendant was liable in damages (*Bird v. Holbrook*, 4 Bing. 628).

<sup>1</sup> Declaration in case alleged that the defendant wrongfully and unlawfully set and concealed a dog-spear, the same being an engine calculated to do grievous bodily harm, as well to the liege subjects of the queen as to their dogs happening to run upon the same, among the bushes near a public footway, running through a close of the defendants ; by means whereof, a dog of the plaintiff's, with which he was going on foot along the said footway, and which, by reason of a rabbit having crossed the footway in his view, had then, against the will of plaintiff, begun to pursue, and was in pursuit of the said rabbit, ran upon the dog-spear and was wounded, &c. Plea, that the defendant set the spear to preserve his game, and to disable and kill dogs that might come upon his close, lest they should destroy the game, whereof the plaintiff had notice. Held, on general demurrer, that this plea was a good answer to the action, and that it would have been so, even without the allegation of notice (*Jordin v. Crump*, 8 Mees. & W. 782).

<sup>2</sup> If a man place dangerous traps baited with flesh in his own ground, so near to a highway, or to the premises of another, that dogs passing along the highway, or kept in his neighbor's premises, must probably be attracted by their instinct into the trap, and in consequence of such act, his neighbor's dogs be so attracted and thereby injured, an action on the case lies (*Townsend v. Wathen*, 9 East, 277).

<sup>3</sup> In *Fletcher v. Rylands* (Law Rep. 3 H. L. 330 ; affirming S. C., 1 Ex. 265) the defendants were held liable, although free from negligence, for the escape of water from their reservoir into mines beneath. The court held that the defendants were under an absolute obligation to confine the water collected by them to their own land. Compare *Todd v. Cochell*, 17 Cal. 97, and *post*, §§ 574, 575. One who maintains a vault, so that to his knowledge filthy water filters from it into the land of a neighbor,

the water coming naturally upon his land, he uses it in a manner which he ought to foresee will involve dangers to his neighbors beyond his power to prevent, he cannot excuse himself by subsequent care and diligence. But if he has a reasonable expectation that he will be able to control it, the owner or occupant of land is not liable for damage done by water which he has introduced, or diverted from its natural flow, unless he fails to exercise due care and diligence in its use.<sup>1</sup> He is guilty of negligence if he fails to anticipate and provide security against the ordinary changes of temperature, floods, &c., to which the country is subject; but he is not liable for the consequences of natural events which are of such rare occurrence that he could not reasonably anticipate them.<sup>2</sup> Thus, in Georgia,

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where it injures a cellar and well, is liable in damages for the injury, without other proof of negligence (*Ball v. Nye*, 99 Mass. 582).

<sup>1</sup> In *Whitehouse v. Birmingham Canal Co.* (27 Law Jour. [Exch.] 25; 5 Hurlst. N. [Am. ed.] 928), it appeared that the plaintiff's land had been overflowed by water from the defendant's canal, but that if the defendant had attempted to confine the water within the canal, it would have burst the banks, and have done much greater damage. The jury found that the defendant did all that was in its power under the circumstances. Held, that the defendant was not liable (see *Beard v. Murphy*, 37 Verm. 99).

<sup>2</sup> An overflow, caused by a frost more severe than had been known for twenty-five years, bursting the defendant's pipes, was held to afford no ground of action (*Blyth v. Birmingham Waterworks Co.*, 11 Exch. 781). The proprietor of a drain, who uses ordinary care and prudence in closing it, is not liable for damage caused to his neighbor by the sudden overflow of the drain (*Rockwood v. Wilson*, 11 Cush. 221). The defendant kept a delph (a species of drain), the banks of which were strong enough to resist the pressure of water properly coming therein, but not sufficiently strong to bear the pressure of an amount of water which was frequently in the delph through the neglect of other persons whose duty it was to keep a certain outlet free. On one of these occasions the banks gave way, and a third person's land was injured thereby. Held, that the defendant was liable (*Harrison v. Great Northern Railw. Co.*, 3 Hurlst. & C. 231). A railway company owning land directly over a mine, made excavations by means of which a porous rock was reached, so that water could filter through it into the mine. In consequence of the obstruction of the stream during a great flood, the water overflowed its banks, poured into the excavation, and from thence percolated into the plaintiff's mine. If the defendant's drains had been properly constructed, the water would have been carried away from the excavation. Held, that the company was liable, as the overflow was caused by its negligence in not keeping a sufficient drain (*Bagnall v. London & Northwestern R. Co.*, 1 Hurlst. & C. 544; affirming *S. C.*, 7 Hurlst. & N. 423).

it would be wholly unnecessary to guard water-pipes against severe frost; while in Minnesota it would be gross negligence not to anticipate and provide for such a contingency. So, in mountainous or snowy regions, it is the obvious duty of the proprietor of an artificial stream to protect it from freshets, while in other parts of the same state such precautions may be quite superfluous. It is no defense, even where the overflow is caused by the accidental fall of a decayed wall into the stream, thus blocking it up, that the defendant removed the obstruction as soon as he had notice of it. If the obstruction was caused by his negligence, he was liable therefor from the time of its occurrence, whether he knew of it or not.<sup>1</sup> We shall speak, in a subsequent chapter,<sup>2</sup> of the liability of land-owners for injuries caused by the unlawful obstruction, diversion, or pollution of natural streams of water.

§ 511. The erection of a building of any kind inevitably concentrates a quantity of the rain-fall, and gives it a direction which it would not naturally have. The owner is, therefore, bound to see that the flow of water thus caused does not inflict greater injury upon the adjoining owners than would happen from the rain falling upon the ground in a natural state. He has no right to let the water drip from his roof upon his neighbor's premises, nor even to let it drip upon his own land in such manner as to overflow his neighbor's ground.<sup>3</sup>

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<sup>1</sup> Bell v. Twentyman, 1 Q. B. 766; Hawksworth v. Thompson, 98 Mass. 77. One who, in building or repairing his house, places materials in the public gutter in front, is liable for an overflow caused by such obstructions. The right which he may have to occupy a part of the street temporarily with building materials does not justify him in so using that privilege as to obstruct the gutter (Ball v. Armstrong, 10 Ind. 181).

<sup>2</sup> See chapter on WATER-COURSES, *post*.

<sup>3</sup> Bellows v. Sackett, 15 Barb. 96; see Thomas v. Kenyon, 1 Daly, 132; Tucker v. Newman, 11 Ad. & El. 40.

§ 512. Since the introduction of water into houses, there have been many instances of damage done to tenants of the lower floors by the overflow of water on upper floors occupied by other tenants, or by the owners of the fee. Sometimes such an overflow arises solely from defective plumbing, the pipes being too weak to withstand the pressure of the water, or the severity of frost, or the faucets leaking faster than the waste pipes will carry off. In some cases no waste pipe is provided; but this is inexcusable negligence.<sup>1</sup> For all defects of this nature the owner of the house is presumptively responsible, as the plumbing work is a part of the real estate, no matter by whom it is done. It may occasionally happen that, by some arrangement between the landlord and tenant, the tenant not only puts up the water pipes, but retains his property in them, and thus the landlord may avoid responsibility for the work; but this is seldom the case.

§ 513. If the landlord provides pipes and other plumbing work of good quality, the tenant only is responsible for the mode in which these accommodations are used, and for any overflow, caused either by neglect to turn off the water, or by such misuse of the works as deprives them of power to stop the flow of water.<sup>2</sup> Where two or more tenants occupy separate holdings in the upper part of a building, and all have access to, and a right to use, a faucet, they do not become jointly liable for its misuse; and mere proof that it was negligently left running, without showing by whom, is not enough to charge any of them with liability for the injury done.<sup>3</sup> It has been lately held that the tenant of an upper floor is liable

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<sup>1</sup> Warren v. Kauffman, 2 Phila. 259.

<sup>2</sup> Weston v. Incorporation of Tailors, Hay, 66; 14 F. C. 1232.

<sup>3</sup> Moore v. Goedel, 7 Bosw. 591; affirmed, 34 N. Y. 527. Compare Ortmayer v. Johnson, 45 Ill. 469.

for damage caused by the negligence of a visitor in leaving a faucet open.<sup>1</sup>

§ 514. A more difficult question arises where the landlord provides apparatus which, if used with more than ordinary care, is sufficient, but which a tenant uses carelessly, and thus produces an overflow. In such cases, the injury suffered by the lower tenant is really the result of the concurring negligence of the landlord and the upper tenant; and where this is fully established, and the tenant has not used ordinary care, of course both are liable for the damage. But in many cases it is very difficult to determine which party is really in fault. The tenant is not responsible if he used ordinary care, and the landlord is not if he used the same. Where the landlord has provided apparatus which is obviously defective, the tenant must either abstain from using it, or must use it with a degree of caution which would be wholly unnecessary if proper works had been put up. But where the defect is not obvious, and is not in fact known to the tenant (which is in such a case to be presumed), he is not bound to use more care than the external appearance of the works seems to demand. Thus, if a faucet is left without any waste pipe, the tenant ought to use it with extreme caution; but if a waste pipe is provided, the tenant has a right to presume that it is not choked, and that it is capable of carrying off a moderate stream of water.<sup>2</sup>

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<sup>1</sup> Killion v. Power, 51 Penn. St. 429.

<sup>2</sup> In Robbins v. Mount (4 Robertson, 553), one of these difficult questions came before the court. The landlord of a building used for commercial purposes, and leased to a number of separate tenants, provided a janitor for the building, who received his wages from the tenants, in proportion to the space occupied by each. A faucet was left running in the room of an upper tenant one night, into a urinal which was partly choked up with tobacco, and had no outlet at the top, otherwise than upon the floor, and great damage was thereby caused to the plaintiffs, who were tenants below. The weight of evidence indicated that the faucet was left open by a servant of the janitor, after cleaning the rooms of the tenant in whose premises

## CHAPTER XXIX.

### SHERIFFS.\*

- SEC. 515. Functions and duties of sheriffs.
516. To whom liable for official misconduct.
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518. Liability for misconduct of deputies.
519. What will relieve from liability for acts of a deputy.
520. Defaults for which sheriff is liable.
521. Delay in execution of process.
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527. Prior writ to be first executed.
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543. Duty of sheriff to prosecute sureties.
544. Liability for escape of prisoner.
545. What constitutes an escape.
546. What will excuse an escape.
547. Defenses in action for an escape.
548. Recapture of prisoner, when a defense.

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it was situated. A verdict was rendered against the landlord, which was set aside on appeal to the general term, the court holding that the janitor was, *ad hoc*, the tenant's servant, and that, the evidence showing that the urinal was such as was commonly used when it was put up, it was not negligence in the landlord to leave it there, although since that time, and before the injury occurred, a new article had been introduced, which was not liable to be choked by any thing thrown into it.

\* Under this head we have collected the cases relating to constables and all other officers executing process, as well as those relating strictly to sheriffs.

§ 515. The functions of sheriffs and other officers charged with the execution of process are purely ministerial. Their duties are generally prescribed by statute: for their negligence or other official misconduct special statutory remedies are provided; and for particular breaches of duty special penalties are imposed. Such enactments do not, however, unless by their express terms, supersede the common law liability to which every ministerial officer is subject. Therefore, a statute which gives an action of debt against a sheriff for an escape,<sup>1</sup> or for neglect to levy execution,<sup>2</sup> does not impair the common law remedy of action on the case.

§ 516. In executing process, a sheriff owes a duty both to the creditor and to the debtor named in the process. For any misconduct or negligence on his part, by which the former is damaged, he is liable in a civil action; and so for acts done *colore officii*, oppressively, cruelly, or in excess of authority, by which the debtor, or a third person, is wronged, he is liable in damages to them.<sup>3</sup> The books

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<sup>1</sup> Rawson v. Dole, 2 Johns. 455; Bonafous v. Walker, 2 T. R. 126; Homan v. Liswell, 6 Cow. 659; Jenner v. Joliffe, 9 Johns. 381.

<sup>2</sup> Platt v. Sherry, 7 Wend. 236; see Hayes v. Porter, 22 Maine, 371; White v. Wilcox, 1 Conn. 347, and *post*, § 544.

<sup>3</sup> It is laid down that if an officer is guilty of any act under color of his office, directly affecting the rights of parties not named in his precept, they have a remedy against him. But if he omits the performance of any duty resulting from a precept in his hands, those alone can maintain an action against him therefor who are parties thereto (Moulton v. Jose, 25 Maine, 76). A sheriff is not liable at the suit of a party injured by his neglect to preserve the peace, but only for his misfeasance or neglect in serving a process in which the plaintiff is interested, or for maliciously hindering or preventing the plaintiff from exercising some special right or privilege (South v. Maryland, 18 How. [U. S.] 396). It has been held that if the purchaser at a sale on execution loses his title to the property, in consequence of the neglect of the sheriff's officer to comply with the requirements of the law, he has an action against the sheriff (Sexton v. Nevers, 20 Pick. 451). It is the duty of the sheriff, on offering property for sale under execution, to state the interest which he proposes to sell, and to make known any defect of title which is within his knowledge, and failing so to do, he is responsible to the purchaser if the title should turn out to be defective (Commonwealth v. Dickinson, 5 B. Monr. 506).

abound with actions of assault and battery, false imprisonment, and trespass brought against such officers by the defendant named in the process. It is not within the scope of this chapter, and it is not, therefore, our intention, to collect here this numerous class of cases.<sup>1</sup> We shall speak only of the liability of such officers to the person in whose favor a civil process is issued, for negligence in its execution. For convenience we shall use the term sheriff as inclusive of all officers possessing similar functions, such as constables, marshals, and the like.

§ 517. Before a party can maintain an action against a sheriff for official misconduct, he must show a legal duty to himself. It is not enough that in the careless discharge of his duty to one, the sheriff's negligence may glance off, and indirectly and remotely work injury to another.<sup>2</sup> Thus, a sheriff who proceeds to collect a judgment for one creditor in so negligent a manner that the debtor's property is wasted, and the junior liens of another creditor are rendered worthless, is not liable to the junior creditor for the loss of his security,<sup>3</sup> except in case of a fraudulent intent on the part of the sheriff to

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<sup>1</sup> In dismissing, however, the question of the liability of such officers to other persons than the creditor, we will cite the rule, ancient and well settled, that a ministerial officer is protected in the execution of process, wherever there is jurisdiction of the subject-matter, if the process is regular on its face, and does not disclose the want of jurisdiction (*Savacool v. Boughton*, 5 Wend. 170; *Parker v. Walrod*, 16 Id. 514; *Earl v. Camp*, 16 Id. 562; *Pierson v. Gale*, 8 Verm. 512; *Beach v. Furman*, 9 Johns. 229; *Lattin v. Smith*, Breese, 284; *Nichols v. Thomas*, 4 Mass. 232; *Portland Bank v. Stubbs*, 6 Mass. 421; *Hutchinson v. Brand*, 9 N. Y. 208; *Chegaray v. Jenkins*, 5 N. Y. 376; *Noble v. Halliday*, 1 Id. 330; *Webber v. Gay*, 24 Wend. 485; *People v. Warren*, 5 Hill, 440). As to whether the officer is protected by a process which is void, see *Smith v. Shaw*, 12 Johns. 257; *Cable v. Cooper*, 15 Id. 152; *Whipple v. Kent*, 2 Gray, 410; *Damon v. Bryant*, 2 Pick. 411; *McDonald v. Wilkie*, 13 Ill. 22; *Tefft v. Ashbaugh*, 13 Id. 602; *Barnes v. Barber*, 1 Gilm. 401; *Parker v. Smith*, Id. 411; *Churchill v. Churchill*, 12 Verm. 661; *People v. Warren*, 5 Hill, 440; *Yates v. St. John*, 12 Wend. 74; *Shufford v. Cline*, 13 Ired. [N. C.] Law, 463.

<sup>2</sup> *Bank of Rome v. Mott*, 17 Wend. 554; *South v. Maryland*, 18 How. [U. S.] 396; *Harlan v. Lumsden*, 1 Duvall, 86; *Moulton v. Jose*, 25 Maine, 76.

<sup>3</sup> *Bank of Rome v. Mott*, 17 Wend. 554.



diminish the security, in which case he will undoubtedly be liable.<sup>1</sup>

§ 518. All actions for breach of duty in the office of sheriff must be against the high sheriff, though the default may have been committed by one of his deputies. The deputy's negligence is a matter to be settled between him and the sheriff.<sup>2</sup> And no action, unless given by statute, will lie against the deputy for a mere breach of duty in his office;<sup>3</sup> though he is personally liable for a trespass committed by him in the supposed discharge of his duty.<sup>4</sup>

§ 519. But the sheriff is answerable for the acts of his deputy only while the relation between them exists;<sup>5</sup> and a sheriff, whose deputy has attached goods, is not liable for the neglect of the same person, acting as deputy of a succeeding sheriff, to levy an execution on the attached property.<sup>6</sup> The fact that the deputy who was guilty of the

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<sup>1</sup> *Fairfield v. Baldwin*, 12 Pick. 388; see *Chapman v. Thornburgh*, 17 Cal. 87; *Wilson v. Hillhouse*, 14 Iowa, 199. A sheriff having attached goods of the debtor is not bound, at the request of another creditor, to attach in his suit, under the same writ, other property of the debtor (*Goddard v. Austin*, 15 Mass. 133).

<sup>2</sup> *Cameron v. Reynolds*, Cowp. 403; *M'Intyre v. Trumbull*, 7 Johns. 35; *Harlan v. Lumsden*, 1 Duvall, 86; *Watson v. Todd*, 5 Mass. 271; *Perley v. Foster*, 9 Id. 112; *Vinton v. Bradford*, 13 Id. 114; *Congdon v. Cooper*, 15 Id. 10; *Campbell v. Phelps*, 17 Id. 244; *Rice v. Hosmer*, 12 Id. 127. The sheriff is responsible for all official neglect or misconduct of his deputy, and also for his acts, not required by law, where he assumes to act under color of office; but he is not responsible for the neglect of any act or duty which the law does not require the deputy officer to perform (*Harrington v. Fuller*, 18 Maine, 277; *Clute v. Goodell*, 2 McLean, 193; *Harriman v. Wilkins*, 20 Maine, 93).

<sup>3</sup> *Cameron v. Reynolds*, Cowp. 403; *Paddock v. Cameron*, 8 Cow. 212. But he, like any other agent, may make himself responsible by a special undertaking (*Tuttle v. Love*, 7 Johns. 470).

<sup>4</sup> Where a sheriff is liable for the trespass of his deputy in the execution of process, both may be sued jointly for such wrongful act (*Waterbury v. Westervelt*, 9 N. Y. 598; *King v. Orser*, 4 Duer, 431; but see *Campbell v. Phelps*, 1 Pick. 62; *Moulton v. Norton*, 5 Barb. 286; *Knowlton v. Bartlett*, 1 Pick. 271; *Tobey v. Leonard*, 15 Mass. 200; *Waterhouse v. Waite*, 11 Id. 207; *Marshall v. Hosmer*, 4 Id. 60).

<sup>5</sup> *Blake v. Shaw*, 7 Mass. 505.

<sup>6</sup> *Ib.* But where a deputy, after the resignation of the sheriff, completed the service of a process placed in his hands before the resignation, the sheriff was held

wrongful act (*e. g.*, neglecting to levy and sell under an execution) was appointed at the suggestion of the creditor will not relieve the sheriff from liability,<sup>1</sup> there being no collusion or bad faith on the part of the creditor in making the nomination. Nor will instructions given by the creditor to the deputy make the latter his agent, so as to discharge the sheriff.<sup>2</sup> But the party in whose favor process issues may give such directions to the deputy as will not only excuse him from his general duty, but bind him to the performance of something different; and in such case the sheriff is not liable to such party for the deputy's negligence.<sup>3</sup>

§ 520. The liability of the sheriff has been most frequently brought in question in actions by the plaintiff in the process for negligence: (1) in omitting or delaying to execute mesne or final process; (2) in returning such process; (3) making a false return; (4) in taking insufficient sureties, not prosecuting bail, &c.; and (5) for escapes.

§ 521. A sheriff to whom a valid process is issued is

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liable for his neglect (*Larned v. Allen*, 13 Mass. 295; *Hill v. Fitzpatrick*, 6 Ala. [N. S.] 314).

<sup>1</sup> *Martin v. Martin*, 2 Jones [N. C.] Law, 285. But in *Pallister v. Pallister* (1 Chit. 614, *n.*), it was held that the sheriff is discharged by the plaintiff's appointing a special bailiff and agent to manage the sale, though the sheriff returned that he had sold, and that he had paid the sum legally deducted for the auction.

<sup>2</sup> *Sheldon v. Payne*, 7 N. Y. 453; but see *Gorham v. Gale*, 6 Cow. 467; 7 Id. 739.

<sup>3</sup> *Root v. Wagner*, 39 N. Y. 9; *Godfrey v. Gibbons*, 22 Wend. 569; *Walters v. Sykes*, Id. 566; *Weld v. Chadbourne*, 37 Maine, 221; *Mickles v. Hart*, 1 Denio, 548. If a deputy sheriff has authority from the creditor to manage an execution according to his discretion, the sheriff is discharged from his liability for the official neglect of such deputy (*Fletchers v. Bradley*, 12 Verm. 22; *Samuel v. Commonwealth*, 6 Monr. 173; *Ordway v. Bacon*, 14 Verm. 378; *Kimball v. Perry*, 15 Verm. 414; but see *New Hampshire Bank v. Varnum*, 1 Metc. 34; *Corning v. Southland*, 3 Hill, 552). An officer receiving directions to do the best he can, is not liable for not arresting the body of the defendant, without proof of special damages (*Walker v. Haskell*, 11 Mass. 177). But an agreement between the creditor and debtor, to suspend the levy of an execution, constitutes no defense to the officer in an action against him for not serving the execution delivered to him (*Derby Bank v. Landon*, 2 Conn. 417).

bound to exercise ordinary skill and diligence in its execution, and for any neglect to exercise such skill and diligence is liable for any damages which the creditor named in the process may have in consequence sustained;<sup>1</sup> but if all actual damage is clearly disproved, nominal damages cannot be recovered.<sup>3</sup> If he wholly omits to arrest a defendant, or to seize his property, or delays doing so for an unreasonable time, in consequence of which the party escapes service, or carries away his property, or becomes bankrupt, or other creditors obtain a prior lien, the delinquent sheriff is liable in damages. The question as to what is due diligence or unreasonable delay in such cases is a mixed question of law and fact.<sup>3</sup> Ordinarily the sheriff has until the return day named in the writ or process within which to execute it;<sup>4</sup> but where he has reason to

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<sup>1</sup> *Barnard v. Ward*, 9 Mass. 269; *Dorrance v. Commonwealth*, 13 Penn. St. 160; *Kittredge v. Fellows*, 7 N. H. 399; *Kirksey v. Prior*, 13 Ala. [N. S.] 190; *Neal v. Price*, 11 Geo. 297; *Sherrill v. Shuford*, 10 Ired. [N. C.] Law, 200; *Lawson v. State*, 5 Eng. [Ark.] 28; *Wolfe v. Dorr*, 24 Maine, 104; *Kimball v. Davis*, 19 Id. 310; *Pierce v. Partridge*, 3 Metc. 44; *Trigg v. McDonald*, 2 Humph. 386; *Watkinson v. Bennington*, 12 Verm. 404; *State v. Porter*, 1 Harringt. 126; see *Lee v. Hardeaway*, 6 Yerg. 502. If, without searching for property, he immediately arrests the defendant, he does it at his peril; and he is liable if it appears that with reasonable diligence he might have found property to attach (*Hollister v. Johnson*, 4 Wend. 639). The statute of New York provides that "every sheriff or other officer to whom any process shall be delivered shall execute the same according to the command thereof, and shall make due return of his proceedings thereon, which return shall be signed by him. For any violation of this provision, such sheriff or other officer shall be liable to an action at the suit of any party aggrieved, for the damages sustained by him, in addition to any other fine, punishment, or proceeding which may be authorized by law" (2 N. Y. Rev. Stat. 440, § 77). It is also provided by the New York Code of Procedure (§ 419), that "whenever, pursuant to this act, the sheriff may be required to serve or execute any summons, order, or judgment, or to do any other act, he shall be bound to do so in like manner as upon process issued to him, and shall be equally liable in all respects for neglect of duty."

<sup>2</sup> *Wylie v. Birch*, 4 Q. B. 566; *Williams v. Mostyn*, 4 Mees. & W. 145. But in default of any proof as to damage, nominal damages may be recovered (*Clifton v. Hooper*, 8 Jur. 958; *Bales v. Wingfield*, 4 Q. B. 580, n.; 2 Nev. & M. 831; *Ledyard v. Jones*, 4 Sandf. 67; *Humphrey v. Hathorn*, 24 Barb. 278; *Pardee v. Robertson*, 6 Hill, 550; *Selfridge v. Lithgow*, 2 Mass. 374).

<sup>3</sup> *Whitsett v. Slater*, 23 Ala. [N. S.] 626.

<sup>4</sup> See *Tucker v. Bradley*, 15 Conn. 46.

believe that there will be danger of loss to the creditor in delaying the service, he is bound to make service as soon as he reasonably can.<sup>1</sup> If the plaintiff in the writ informed the officer of the danger of delay, and directs an immediate service, the sheriff is bound to follow such directions, and on failure is answerable for the consequences.<sup>2</sup>

§ 522. To maintain an action for negligence in the execution of mesne process, the plaintiff must show that he had a cause of action against the debtor; and in general, whatever evidence would be sufficient to charge the original party in a suit against him, will be admissible in an action against the sheriff.<sup>3</sup> In such an action, the rule of damages is the injury actually caused by the officer's neglect.<sup>4</sup> To show damages, it is not sufficient that the debtor had property: it must also be shown that the officer did not use reasonable diligence to discover it.<sup>5</sup>

§ 523. Where the debtor has sufficient property with which to satisfy the debt called for by a writ, it is negligence for the sheriff not to levy upon sufficient for that purpose.<sup>6</sup> In estimating the amount necessary for that

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<sup>1</sup> *Tucker v. Bradley*, 15 Conn. 46. In that case the jury were charged that an officer, after receiving a writ without any instructions, could not spend more time before the service than what is usually devoted to rest and refreshment. On appeal, it was justly thought that the rule laid down was too rigorous, and, as it might have operated on the minds of the jury to the prejudice of the defendant, a new trial was granted. In *Lindsay v. Armfield* (3 Hawks, 548), it was held that a delay to execute a process from October 7 to November 1, unaccounted for, was a neglect for which the sheriff was liable.

<sup>2</sup> *Tucker v. Bradley*, 15 Conn. 46; *Pierce v. Partridge*, 3 Metc. 44.

<sup>3</sup> *Sloman v. Herne*, 2 Esp. 695; *Parker v. Fenn*, Id. 477, note; *Alexander v. Macauley*, 4 T. R. 611; *Williams v. Bridges*, 2 Stark. 42; *Gibbon v. Coggin*, 2 Campb. 188; *Riggs v. Thatcher*, 1 Greenl. 68.

<sup>4</sup> *Palmer v. Gallup*, 16 Conn. 555; *Pierce v. Strickland*, 2 Story, 292; *Dyer v. Woodbury*, 24 Maine, 546.

<sup>5</sup> *Fisher v. Gordon*, 8 Mo. 386; *Jacobs v. M'Donald*, 18 Id. 565; *Haynes v. Tunstall*, 5 Ark. 680; *Lawton v. Erwin*, 9 Wend. 233.

<sup>6</sup> *Ransom v. Halcott*, 18 Barb. 56; *Pitcher v. King*, 5 Q. B. 758; *Governor v. Powell*, 9 Ala. [N. S.] 83; *Griffin v. Ganaway*, 8 Id. 625.

purpose, he is bound to exercise a sound discretion, and having done so, he is not liable if it turns out to be insufficient; nor, on the other hand, is he liable to the debtor for an excessive levy, if it should turn out to be more than sufficient.<sup>1</sup> The mere inadequacy of the price which the property brings at the sale, if sold regularly, without fraud, is not enough to sustain an action against the sheriff for an insufficient levy.<sup>2</sup> It is enough if the levy was sufficient at the time it was made, notwithstanding that, before the day of sale, the property depreciated in value.<sup>3</sup> The value is to be estimated in current money; <sup>4</sup> although it has been held, without, we think, due consideration, that if a sheriff make a levy on property which would satisfy the judgment if sold for bank notes, but would be insufficient if sold for legal tender money, he is not chargeable for a breach of duty.<sup>5</sup>

§ 524. A sheriff cannot, as a general rule, insist that the creditor in whose favor a process is issued shall search for, and point out, the debtor's property. But in the case of goods not in the debtor's possession, or of property, the title to which is matter of record, it is reasonable to require that the creditor should point out such property.<sup>6</sup> It has been held, therefore, that an officer is not liable to the creditor for not attaching real estate of the debtor, which the creditor never directed him to attach.<sup>7</sup>

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<sup>1</sup> *Commonwealth v. Lightfoot*, 7 B. Monr. 298.

<sup>2</sup> *Lynch v. Commonwealth*, 6 Watts, 495.

<sup>3</sup> *Governor v. Carter*, 3 Hawks, 328.

<sup>4</sup> In *Harper v. Fox* (7 Watts and Serg. 142), it was held that if a sheriff receives bank notes as cash in payment of an execution, the execution is discharged, and the sheriff is liable to the plaintiff in the execution for the amount, if the notes become worthless in his hands.

<sup>5</sup> *Governor v. Carter*, 3 Hawks, 328.

<sup>6</sup> See *Bond v. Ward*, 7 Mass. 123; *Perley v. Foster*, 9 Id. 112.

<sup>7</sup> *Palmer v. Gallup*, 16 Conn. 555. In Maine, an officer is not bound to make a special service of a writ, without written directions from the creditor or his attor-

§ 525. Where there are reasonable grounds of doubt as to the debtor's title to property, the officer may, in those states where the English practice of sheriff's juries prevails, call a jury to try the question of title. He cannot insist upon indemnity, and the creditor is not bound to tender indemnity, until the jury have passed upon the question of title. If the jury find the property not to be the debtor's, he may then insist upon indemnity before proceeding to sell, and, unless indemnified, he may return the writ *nulla bona*.<sup>1</sup> But the finding of the jury is not conclusive; and if, notwithstanding a verdict that the title is not in the debtor, the officer refuses to sell on a tender of sufficient indemnity, and returns the execution unsatisfied, he is liable for a false return.<sup>2</sup> In Massachusetts, and in other states where no provision is made for the trial of titles by a sheriff's jury, the sheriff may insist on being indemnified, whenever there is reasonable ground to doubt the debtor's title to property levied upon.<sup>3</sup>

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ney, and, therefore, a creditor who does not give such instructions, cannot complain that the sheriff in attaching the debtor's property did not attach sufficient to secure the debt (*Betts v. Norris*, 15 Maine, 468).

<sup>1</sup> *Curtis v. Patterson*, 8 Cow. 65; *Bayley v. Bates*, 8 Johns. 143.

<sup>2</sup> *Van Cleef v. Fleet*, 15 Johns. 147. It has been held in Kentucky that where a sheriff summons a jury to try the right of property taken on execution, and they cannot agree, the sheriff is bound to sell, and is not liable to any suit on account of such sale (*Commonwealth v. Herndon*, 2 Dana, 429; *Potts v. Commonwealth*, 4 J. J. Marsh. 202).

<sup>3</sup> *Bond v. Ward*, 7 Mass. 123; *State v. Sharp*, 2 Sneed, 615; *Weld v. Chadbourne*, 37 Maine, 221. But a sheriff cannot demand security from the plaintiff before levying the execution, unless there exists a well-grounded apprehension that the title to the property to be levied on is not in the defendant (*Adair v. M'Daniel*, 1 Bailey, 158; see *Wallace v. Holly*, 13 Geo. 389). In *Miller v. Commonwealth* (5 Penn. St. 294), the sheriff levied on property, with notice of an adverse claim, under a promise by the plaintiff to indemnify him before the sale. It was held that the sheriff was liable for the property, if it belonged to the execution defendant, although no indemnity had been given and none had been demanded. In *Jessop v. Brown* (2 Gill & J. 404), where the property levied upon was claimed by third persons, and the creditor would not indemnify, the court, on the application of the sheriff, the claimant's title being shown, granted a rule absolute, either to indemnify the sheriff, or to permit him to enlarge the time of making his return, from term to term, until that was done.

§ 526. To charge a sheriff in damages for not arresting a defendant in the writ, it must appear that the sheriff had notice of the party's being in his bailiwick, between the delivery and the return of the writ. But the creditor is not bound to find out the defendant in the writ, especially when he can be found by the officer by the exercise of ordinary diligence.<sup>1</sup> On mesne process, it is sufficient if the body of the debtor is produced on the return day named in the writ, and the sheriff is not liable as for an escape, though the debtor may have been at large between the arrest and the return day. But an arrest of the debtor after the return day will not excuse the sheriff's neglect to make the arrest before that day, and the creditor is entitled to at least nominal damages.<sup>2</sup> In the case, however, of an arrest on an execution, if the debtor is at large after the arrest for the shortest time, either before or after the return of the writ, it is an escape for which the sheriff will be liable.<sup>3</sup>

§ 527. A sheriff, having several executions against the property of the same debtor, is bound to execute them in the order in which they were received by him. If he levies and sells under a junior execution, he is bound to use the proceeds toward the satisfaction of the first execution.<sup>4</sup>

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<sup>1</sup> Beckford v. Montague, 2 Esp. 475; compare Gibbon v. Coggon, 2 Campb. 189.

<sup>2</sup> Barker v. Green, 2 Bing. 317.

<sup>3</sup> See *post*, § 545.

<sup>4</sup> Million v. Commonwealth, 1 B. Monr. 310; Niberry v. Noland, 2 J. J. Marsh. 421; Rogers v. Edmunds, 6 N. H. 70. Where a sheriff had two executions against a defendant, and levied the junior execution on property of a *stranger*, he was held not liable to the plaintiff in the elder execution, nor to the surety of the defendant, for not first applying the proceeds to the elder execution (Staton v. Commonwealth, 2 Dana, 397). An officer receiving an execution against a firm for an individual debt, and subsequently one for a partnership debt, is liable to the plaintiff in the partnership execution, if he does not levy first for the partnership debt (Trowbridge v. Cushman, 24 Pick. 310). Where the amount of mortgages exceeds the entire value of the mortgaged property, only nominal damages can be recovered against the sheriff, for refusing to levy upon and sell the property on execution against the mortgagor (Coopers v. Wolfe, 15 Ohio St. 523).

But it is no excuse for not levying on property, under a junior execution, that the property had been levied on under prior executions.<sup>1</sup>

§ 528. An officer is under no obligation to execute a void process,<sup>2</sup> or process obtained by fraud;<sup>3</sup> and he may, in an action against him for refusing to execute it, set up its invalidity. If he has undertaken to execute such process, he may suspend action at any time, and release any property that he has collected, or person that he has arrested under it;<sup>4</sup> and his return of a partial collection of the execution does not create an estoppel.<sup>5</sup> But he cannot refuse to execute a process which is merely voidable. Only the defendant therein can avail himself of that objection.<sup>6</sup> The irregularity of the process may, however, be given in evidence by the sheriff in mitigation of damages.<sup>7</sup>

§ 529. Where it is provided by statute that the lien of an attachment shall cease, unless within a certain time after judgment in the action execution issue, and a levy

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<sup>1</sup> *State v. Gemmill*, 1 *Houston* [Del.] 9. And see *Brown v. McCrary*, 30 *Geo.* 878. In Maine, however, an opinion has been expressed, that it is a good defense for the sheriff, in an action for not levying under a junior attachment, that there were prior attachments, though not levied, which, if levied, would have absorbed the whole value of the property (*Commercial Bank v. Wilkins*, 9 *Greenl.* 28).

<sup>2</sup> *Tucker v. Malloy*, 48 *Barb.* 85; *Cornell v. Barnes*, 7 *Hill*, 35; *Albee v. Ward*, 8 *Mass.* 79; *Boal v. King*, 6 *Ohio*, 11.

<sup>3</sup> *Adams v. Balch*, 5 *Greenl.* 188; *Clark v. Foxcroft*, 6 *Id.* 296.

<sup>4</sup> *Carpentier v. Willett*, 6 *Bosw.* 25; affirmed, 1 *Keyes* [N. Y.] 510; *S. C.*, less fully, 31 *N. Y.* 90.

<sup>5</sup> *Tucker v. Malloy*, 48 *Barb.* 85.

<sup>6</sup> *Bacon v. Cropsey*, 7 *N. Y.* 195; *Ames v. Webbers*, 8 *Weud.* 545; *Jones v. Cook*, 1 *Cow.* 309; *Ross v. Luther*, 4 *Id.* 158; *Ontario Bank v. Hallett*, 8 *Id.* 192; *Kimball v. Munger*, 2 *Hill*, 364; *Green v. Burnham*, 3 *Sandf. Ch.* 110; *Pierce v. Alsop*, 3 *Barb. Ch.* 184; *Berry v. Riley*, 2 *Barb.* 307; *Williams v. Hogeboom*, 8 *Paige*, 469; *Parmelee v. Hitchcock*, 12 *Wend.* 96; *Stone v. Green*, 3 *Hill*, 469; *Rider v. Mason*, 4 *Sandf. Ch.* 351; *Cody v. Quinn*, 6 *Ired.* [N. C.] *Law*, 191; *Spence v. Tuggle*, 10 *Ala.* [N. S.] 538; *State v. McDonald*, 3 *Dev.* [N. C.] *Law*, 468; *Woodruff v. Barrett*, 3 *Green* [N. J.] 40; *Kleissendorff v. Fore*, 3 *B. Monr.* 471; *Stevenson v. M'Lean*, 5 *Humph.* 332.

<sup>7</sup> *Commonwealth v. O'Cull*, 7 *J. J. Marsh.* 149.



thereunder is made on the property, it is the duty of the sheriff to keep the property for the time required after judgment, so that levy may be made under the execution ; and, for failure to do so, he is liable in damages.<sup>1</sup> But the fact of an attachment is not conclusive of 'the sheriff's obligation to levy an execution upon the property ; and in an action against him for neglect to levy, he may show that it was not the property of the debtor.'<sup>2</sup> His removal from office, after the attachment of goods, does not destroy his right to keep them to await the judgment and execution, or excuse his neglect to deliver them to be taken on execution.

§ 530. Having taken into his possession the goods of the debtor, the sheriff is bound to exercise, in respect to their safety and preservation, that degree of care and prudence which a man of ordinary discretion and judgment might reasonably be expected to exercise in reference to his own property. He is not an insurer of the goods, but is regarded as an ordinary bailee for the purpose of custody and sale ; and the principles governing that class of bailments are, therefore, applicable in the case of sheriffs.<sup>3</sup> If

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<sup>1</sup> *Smith v. Bodfish*, 39 Maine, 136 ; *Smith v. Church*, 27 Verm. 168 ; *Ormsby v. Morris*, 28 Id. 711 ; *Howard v. Smith*, 12 Pick. 202 ; *Barnard v. Ward*, 9 Mass. 269 ; *Rich v. Bell*, 16 Id. 294. An officer, attaching goods, and neglecting to remove them, is liable to plaintiff if a subsequent creditor should attach the same goods (*Gale v. Ward*, 14 Mass. 352). The discharge of the execution, pending an action against a sheriff for not properly keeping the attached property, is available only in mitigation of damages, and nominal damages may be recovered (*Brown v. Richmond*, 27 Verm. 583).

<sup>2</sup> *Canada v. Southwick*, 16 Pick. 556 ; see *Brown v. Richmond*, 27 Verm. 583 ; *Tukey v. Smith*, 18 Maine, 125. But if the plaintiff does not issue execution within a reasonable time, the sheriff is not liable for the forthcoming of the attached property. It is not his duty to take out an execution (*Snell v. Allen*, 1 Swan. 208).

<sup>3</sup> In *Browning v. Hanford* (5 Hill, 588, 591), Cowen, J., said, "That a bailee of goods holding them in the capacity of a public officer, has never, that I am aware, been considered as fixing a more rigorous measure of liability upon him than if he were a private person." In *Moore v. Westervelt* (27 N. Y. 234 ; affirming S. C., 9 Bosw. 558), the sheriff seized coal on board of a vessel, in replevin against the master. It was left on the vessel, with the master's consent, in charge of the sheriff's

he keeps the goods on which he has levied in an unsafe place, or exposes them to destruction, he is liable, in case they are lost or destroyed.<sup>1</sup> He is not liable, if the goods are casually destroyed by fire,<sup>2</sup> or are taken from him without any want of ordinary care on his part.<sup>3</sup>

§ 531. If the sheriff, as is frequently the case, leaves the goods with the debtor, taking the receipt of some third person, he assumes the risk of answering to the creditor if the goods are lost through the negligence or fraud of the debtor or of the receiptor.<sup>4</sup> The receiptor, in such case, is liable no further than the sheriff is, and the latter cannot take a receipt, or any other contract in relation to the property, which will give him a remedy beyond his own liability to the creditor, or which will operate to enlarge the liability of the sheriff to the creditor.<sup>5</sup> If the receiptor is nominated by the creditor himself, he, and not the sheriff, is responsible for the fidelity of such bailee.<sup>6</sup>

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keeper, and during a violent storm the vessel sank at the wharf, and the plaintiff in the replevin, having established his title, sued the sheriff for the damage to the coal. Held, that the degree of diligence required of the sheriff was stated favorably enough to the plaintiff by a charge that it was his duty, to take such steps to ensure the safety of the coal as a careful, prudent man of good sense, well acquainted with the condition of the vessel and her location with regard to exposure to storms, might reasonably be expected to take if the coal belonged to himself. Held, also, that a request to charge that the sheriff was responsible for the negligence of the master and crew, after he took possession, was properly refused. See the same case previously before the court, reported in 2 Duer, 59; 1 Bosw. 357; 21 N. Y. 103; see also *Abbott v. Kimball*, 19 Verm. 551; *Hale v. Huntley*, 21 Id. 147; *Bridges v. Perry*, 14 Id. 262; *Conover v. Gatewood*, 2 A. K. Marsh. 566; *Owens v. Gatewood*, 4 Bibb. 494; *Jenner v. Joliffe*, 9 Johns. 381; *Dillenback v. Jerome*, 7 Cow. 294.

<sup>1</sup> *Jenner v. Joliffe*, 9 Johns. 381; 6 Id. 9.

<sup>2</sup> *Browning v. Hanford*, 5 Hill, 588.

<sup>3</sup> *Bridges v. Perry*, 14 Verm. 262.

<sup>4</sup> *Higgins v. Kendrick*, 14 Maine, 83.

<sup>5</sup> See *Browning v. Hanford*, 5 Hill, 588. In that case the receipt to the sheriff purported on its face to render the receiptor absolutely liable for the return of the goods on demand or payment of the debt. The goods having been accidentally destroyed by fire, in the hands of the receiptor, it was sought to make the sheriff liable. Held, that the measure of the sheriff's liability was not enlarged by such a receipt (see *Phillips v. Bridge*, 11 Mass. 242).

<sup>6</sup> *Dorham v. Wild*, 19 Pick. 520; *Rice v. Wilkins*, 21 Maine, 558.

§ 532. Having taken property under an execution, the sheriff is bound to proceed to sell it with reasonable expedition.<sup>1</sup> If through his delay the property is lost, or depreciated in value, or the debtor becomes bankrupt, and the title to the property levied on passes to his assignee, the sheriff is liable to the execution creditor.<sup>2</sup> He is bound to conduct the sale according to the requirements of the law, and with reasonable prudence and skill. Thus he is liable for neglect in not complying with the law requiring notices of the sale of real estate to be put up in two towns adjoining the land.<sup>3</sup> An execution creditor cannot, however, complain of the loss of the property by reason of an adjournment of the sale which was authorized by himself, nor of a delay caused by an injunction against the sale, nor even after a dissolution of the injunction, unless security is given, if required.<sup>4</sup>

§ 533. At common law, no action would lie against the sheriff for not returning an execution or other writ.<sup>5</sup> The practice was to compel a return by attachment, and seek a remedy upon that, if false. But in New York, and in most, if not all of the other states, statutes have been passed, giving to the creditor an action against the sheriff for not returning the writ. Under such a statutory re-

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<sup>1</sup> *Jacobs v. Humphrey*, 2 Cr. & M. 413; 4 Tyrw. 272.

<sup>2</sup> *Aireton v. Davis*, 9 Bing. 740; 3 *Moore & Scott*, 138; *Bales v. Wingfield*, 2 Nev. & M. 831; 4 Q. B. 580, n.; *Carlile v. Parkins*, 3 Stark. 163; *State v. Herod*, 6 Blackf. 444; *Janvier v. Vandever*, 3 Harringt. 29; *Fisher v. Vanmeter*, 9 Leigh, 18. So if an officer levies upon property which he advertises for sale, but neglects to sell, he becomes a trespasser *ab initio* (*Bond v. Wilder*, 16 Verm. 393; and see *Jordan v. Gallup*, 16 Conn. 536).

<sup>3</sup> *Sexton v. Nevers*, 20 Pick. 451. A sheriff is liable to an execution debtor for his officers' negligence in not properly lotting at a sale, the goods seized under a *fi. fa.* (*Wright v. Child*, Law Rep. 1 Exch. 358).

<sup>4</sup> *Conway v. Jett*, 3 Yerg. 481; see *Paterson Bank v. Hamilton*, 1 Green [N. J.] 159; *Le Roy v. Blauvelt*, 1 Id. 341; *Scott v. Dow*, 2 Id. 330.

<sup>5</sup> *Moreland v. Leigh*, 1 Stark. 338, and note; *Commonwealth v. McCoy*, 8 Watts, 153; *Clark v. Foxcroft*, 6 Greenl. 296; see *Commonwealth v. Magee*, 8 Penn. St. 240; *Pardee v. Robertson*, 6 Hill, 550.

quirement, the sheriff is *prima facie* liable for the whole debt, if he neglects to return the writ within the return day.<sup>1</sup> No attachment or notice to the sheriff to return the execution is necessary in order to give the creditor his right of action. The duty is imposed by statute, and the mere omission to perform it creates the right of action;<sup>2</sup> and in all cases the *onus* is on the sheriff to excuse the default.<sup>3</sup> He is bound to return the writ, whether he has served it or not,<sup>4</sup> and to return it to the proper office. If he sends it by mail, he must pay the postage of the letter containing it.<sup>5</sup>

§ 534. It is no excuse for not returning an execution that the property levied on had been taken from the sheriff in a replevin suit,<sup>6</sup> or that the sheriff had more official business than he and his deputies could perform,<sup>7</sup> or that the plaintiff did not pay or secure, or offer to pay or secure to him, his legal fees,<sup>8</sup> or that the execution was

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<sup>1</sup> Swezey v. Lott, 21 N. Y. 481; Pardee v. Robertson, 6 Hill, 550; Humphrey v. Hathorn, 24 Barb. 278; Ledyard v. Jones, 4 Sandf. 67; 7 N. Y. 550; Bank of Rome v. Curtiss, 1 Hill, 275; Peck v. Hurlburt, 46 Barb. 559; Bowman v. Cornell, 39 Barb. 69; Corning v. Southland, 3 Hill, 552; Burke v. Campbell, 15 Johns. 456; Hinman v. Brees, 13 Id. 529; Stevens v. Rowe, 3 Denio, 327; Dygert ads. Crane, 1 Wend. 534; Jenkins v. McGill, 4 How. Pr. 205; Wilson v. Wright, 9 Id. 459; McGregor v. Brown, 5 Pick. 170; Johnson v. Gwathney, 2 Bibb. 186.

<sup>2</sup> Corning v. Southland, 3 Hill, 552; Burk v. Campbell, 15 Johns. 456. In Louisiana, the sheriff is liable, on rule, after ten days' notice (Taylor v. Hancock, 19 La. Ann. 466).

<sup>3</sup> Wilson v. Wright, 9 How. Pr. 459.

<sup>4</sup> Webster v. Quimby, 8 N. H. 382; Kidder v. Barker, 18 Verm. 454.

<sup>5</sup> Jenkins v. McGill, 4 How. Pr. 205. A sheriff having served a writ of attachment, returned it to the house of the clerk, and the clerk not being at home, left it with his wife, and informed her what it was. The writ was never entered on the docket of the court, by reason of which the creditor could not obtain judgment, and lost the greater part of his debt. Held, that the sheriff was not liable (Frink v. Scovel, 2 Day, 480).

<sup>6</sup> Swezey v. Lott, 21 N. Y. 481.

<sup>7</sup> McRae v. Colclough, 2 Ala. [N. S.] 74.

<sup>8</sup> Ib.; Wait v. Schoonmaker, 15 How. Pr. 460. In New York, although a sheriff

irregular.<sup>1</sup> But it is a good defense to an action for not returning an execution before the expiration of the return day, that it has been since returned and satisfied,<sup>2</sup> or that the delay was caused by the directions of the creditor. In the last case no modification of the creditor's directions, after the return day, will render the sheriff liable.<sup>3</sup> In Kentucky, sickness will excuse the sheriff for not returning an execution in time.<sup>4</sup>

§ 535. A sheriff to whom a writ or process has been intrusted for execution is bound to make a true return of it. If he return *non est inventus*, when in fact the defendant in the writ could have been found in the county, or *nulla bona*, when the defendant had property applicable to the writ on which he could have levied, it is a false return, and the officer is *prima facie* liable to the creditor for the amount of the debt with interest,<sup>5</sup> and is liable to any one else, though not a party to the suit, who is damaged by the return.<sup>6</sup>

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may, under the statute, demand his fees for service of a summons and complaint *previous* to the service thereof, yet having served them without prepayment, he cannot retain them, and refuse to make a return because his fees are not paid (Ib.)

<sup>1</sup> *McRae v. Colclough*, 2 Ala. [N. S.] 74; *Bondurant v. Woods*, 1 Id. 543; see *ante*, § 528.

<sup>2</sup> *Libret v. Child*, 1 Root, 262.

<sup>3</sup> *Shannon v. Clark*, 3 Dana, 152; *Homan v. Liswell*, 6 Cow. 659.

<sup>4</sup> *Bruce v. Dyall*, 5 Monr. 125. In Illinois, an officer who neglects to return a fee bill within ninety days from the date thereof, becomes liable to pay the same (*People v. Roper*, 4 Scam. 560.) And it is no excuse, to exempt him from his liability to an attachment, that he could not collect the bill from the defendant (*People v. Nichols*, 4 Scam. 560).

<sup>5</sup> *McArthur v. Pease*, 46 Barb. 423; *Beckford v. Montague*, 2 Esp. 475; *Goodrich v. Starr*, 18 Verm. 227; *Palmer v. Crane*, 8 Mo. 619; *Barnard v. Leigh*, 1 Stark, 43; *Bridges v. Walford*, 6 Maule & S. 42; *Reynon v. Garratt*, 1 Carr. & P. 154; *Glossop v. Pole*, 3 Maule & S. 175. As to whether a sheriff is liable for an insufficient return, see *Goodwin v. Smith*, 4 N. H. 29. To render an officer liable for a false return, an averment "that he failed to make a true and correct return" is insufficient (*Commonwealth v. Bartlett*, 7 J. J. Marsh. 161).

<sup>6</sup> *Heywood v. Hildreth*, 9 Mass. 393

§ 536. It is a false return to suppress material facts, as well as to state facts which are untrue; and a return which, though true in words, is false in substance, is a false return.<sup>1</sup> But a return which states the facts truly, though it draws an erroneous legal conclusion from those facts, is not a false return.<sup>2</sup> A return is not false, although the levy returned as having been made was not completed at the time it was stated to have been.<sup>3</sup> The fact that a return was made ignorantly or mistakenly will not, however, excuse its falsity.<sup>4</sup>

§ 537. As between the parties to it, the sheriff's return is conclusive of its truth,<sup>5</sup> except in an action against the sheriff for a false return, in which case only the return may be controverted by the creditor.<sup>6</sup> As against the sheriff the return is conclusive. If it is incorrect, he can remedy it only on an application to the court for leave to amend it.<sup>7</sup> Thus, if a sheriff returns that he has

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<sup>1</sup> *Rex v. Lyme Regis*, 1 Doug. 148. But in *Tarleton v. Gibson* (2 Ala. [N. S.] 638), it was held that the omission of certain facts in a return does not make a return false, if those stated are true. If a sheriff returns that he has made the money, and satisfied an execution, when in fact he had received in something besides money, he is liable for the debt (*Tiffany v. Johnson*, 27 Miss. 227).

<sup>2</sup> *Lemit v. Mooring*, 8 Ired. [N. C.] Law, 312.

<sup>3</sup> *Hall v. Crocker*, 3 Metc. 245.

<sup>4</sup> *Houser v. Hampton*, 7 Ired. [N. C.] Law, 333; *Clarke v. Gary*, 11 Ala. [N. S.] 98; see *Green v. Ferguson*, 14 Johns. 389.

<sup>5</sup> *Mentz v. Hamman*, 5 Whart. 150; *Sample v. Coulson*, 9 Watts & Serg. 62; *Baker v. McDuffie*, 23 Wend. 289; *Price v. Cloud*, 6 Ala. [N. S.] 248; *Haynes v. Small*, 22 Maine, 14; *Lawson v. Main*, 4 Pike, 184; *M'Bee v. State*, 1 Meigs, 122; *Bank of Gallipolis v. Domigan*, 12 Ohio, 220.

<sup>6</sup> *Slayton v. Chester*, 4 Mass. 478; *Bott v. Burnett*, 9 Id. 96; *Estabrook v. Hapgood*, 10 Id. 313; *Bean v. Parker*, 17 Id. 591; *Barrett v. Copeland*, 18 Verm. 67.

<sup>7</sup> *Purrrington v. Loring*, 7 Mass. 388; *Governor v. Bancroft*, 16 Ala. [N. S.] 605; see *Miller v. Commonwealth*, 5 Penn. St. 294. The return, though made by the deputy in the sheriff's name, is the act of the sheriff, and when the question comes up between one of the parties to the execution and the sheriff, the latter is not permitted to gainsay it (*Sheldon v. Payne*, 9 N. Y. 453; *Townsend v. Olin*, 5 Wend. 207; *Haynes v. Small*, 22 Maine, 14; *Gardner v. Hosmer*, 6 Mass. 324; *Purrrington v. Loring*, 7 Id. 388; *Doty v. Turner*, 8 Johns. 16; *Barrett v. Copeland*, 18 Vt. 67; *Paxton v. Steckel*, 2 Penn. St. 93). The court has power to authorize a sheriff to

levied on certain property under an execution, he cannot, in an action for a false return, set up that the property levied on was not the property of the defendant in the writ.<sup>1</sup>

§ 538. The fact that a return of *nulla bona* was made upon an inquest by a sheriff's jury as to whether the property levied on was the judgment debtor's, or not, is a complete defense in an action for a false return, no bad faith being shown, and this, notwithstanding the property did in fact belong to the judgment debtor.<sup>2</sup> But if the plaintiff in the execution tenders indemnity to the sheriff, he is bound to proceed and sell, and cannot excuse himself by taking inquisition.<sup>3</sup> It is no defense to an action for a false return of *nulla bona* on an execution, to show that the execution was delivered at the sheriff's office at a late hour on the day on which it was returnable,<sup>4</sup> or that it was irregular and voidable,<sup>5</sup> nor to show

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withdraw from the files an execution, and to cancel a return of *nulla bona* made thereon (Barker v. Binninger, 14 N. Y. 270; Adams v. Smith, 5 Cow. 280). A sheriff cannot make evidence for himself by stating in his return an excuse for not performing his duty (Bruce v. Dyall, 5 Monr. 125). He may prove facts outside of his return not inconsistent therewith (Evans v. Davis, 3 B. Monr. 344).

<sup>1</sup> Miller v. Commonwealth, 5 Penn. St. 294; Thornton v. Winter, 9 Ala. [N. S.] 613; Sutton v. Allison, 2 Jones [N. C.] Law, 339.

<sup>2</sup> Bayley v. Bates, 8 Johns. 143. In that case the court charged the jury "that to entitle the plaintiff to recover, he must not only show that the return was false, but that the defendant knowingly, willfully, and deceitfully made such false return; and that it was for the jury to decide whether the defendant acted impartially and with good faith in taking the inquisition." But in an action for trespass for taking goods not belonging to the defendant, such an inquisition can only go in mitigation of damages (Townsend v. Phillips, 10 Johns. 98; Farr v. Newman, 4 T. R. 621, 633, 648; Roberts v. Thomas, 6 Id. 88; Phillips v. Harriss, 3 J. J. Marsh. 122; Wells v. Pickman, 7 Id. 174). And in no case is it conclusive of the right of property, though it may excuse the sheriff for returning *nulla bona* (Van Cleef v. Fleet, 15 Johns. 147 see Hart v. Deamer, 6 Wend. 497).

<sup>3</sup> Van Cleef v. Fleet, 15 Johns. 147; *ante*, § 525.

<sup>4</sup> Towne v. Crowder, 2 Carr. & P. 355.

<sup>5</sup> Bacon v. Cropsey, 7 N. Y. 195. But a sheriff may always defend himself in an action for a false return that the judgment on which an execution was issued was void (McDonald v. Bunn, 3 Den. 45). But the sheriff cannot go into circumstantial

that the execution defendant was insolvent,<sup>1</sup> nor to show a prior execution returned *nulla bona* against the same defendant. The sheriff can justify under a prior execution only by showing that it has been executed and the proceeds applied upon it, or by showing that it has not been returned, and that he had an existing power as well as a subsisting duty to apply the proceeds upon it.<sup>2</sup>

§ 539. In Tennessee it has been held that if the plaintiff in an execution receives money collected on the writ, he thereby waives his right of action against the sheriff for a false return upon that writ for the balance.<sup>3</sup> But it is difficult to see upon what principle this rule is founded; and the contrary doctrine, which is maintained in England, commends itself to our judgment.<sup>4</sup> But it is a good defense that the plaintiff, with full notice of the facts, assented to the return.<sup>5</sup>

§ 540. Where it is the duty of an officer to take proper and sufficient bail for the appearance of a party, or security for the return of property, he is liable in damages if he omits to do so, or if he carelessly and negligently accepts sureties who are insufficient. Thus, if a sheriff releases a debtor from arrest without taking bail from him,<sup>6</sup> or takes a bail bond which is forged,<sup>7</sup> he is liable in

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evidence to impeach the judgment on the ground of a collateral fraud (Tyler v. Leeds, 2 Stark. 218; see Harrod v. Benton, 8 Barn. & Cr. 217; Warmoll v. Young, 5 Id. 660).

<sup>1</sup> Stevens v. Beckes, 3 Blackf. 88. It has been held a good return upon a mesne process, that the sheriff was kept off by force of arms (Crumpler v. Glisson, 5 Tayl. [N. C.] 79).

<sup>2</sup> Paton v. Westervelt, 2 Duer, 362.

<sup>3</sup> Trigg v. McDonald, 2 Humph. 386.

<sup>4</sup> Holmes v. Clifton, 10 Ad. & El. 673; overruling Beynon v. Garrat, 1 Carr. & P. 154.

<sup>5</sup> Stuart v. Whitaker, 2 Carr. & P. 100.

<sup>6</sup> Crane v. Warner, 14 Verm. 40.

<sup>7</sup> Marsh v. Bancroft, 1 Metc. 497. An officer is not liable for returning a bail



damages to the creditor. In England, a sheriff, in taking sureties on a replevin bond, is bound to exercise, in deciding upon their sufficiency, only an ordinary and reasonable discretion.<sup>1</sup> In accepting them, he does not warrant their sufficiency. It has been held, therefore, that a sheriff is justified in accepting as a surety one who appears to the world as a person of responsibility, without making inquiries.<sup>2</sup> But notwithstanding an appearance of respectability, and a general reputation for solvency, if the sheriff knows that a surety is of doubtful solvency, or if he has means of informing himself as to the surety's sufficiency, and neglects to do so, he is liable, if in fact the surety is insufficient.<sup>3</sup> If the sureties proposed are unknown to him, he ought to take means to inform himself as to their sufficiency, and not to rely solely on their own sworn statements.<sup>4</sup>

§ 541. Where a statute declares that the sheriff shall be responsible for the sureties accepted by him, his exercise of any degree of prudence or judgment in their acceptance will not relieve him from liability for their insufficiency. By the New York Code of Procedure, it is

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bond signed by defendant and only one surety, if the latter is sufficient (*Glezen v. Rood*, 2 Metc. 490). Of course, if an arrest is unauthorized, no action will lie against the officer by the creditor for neglecting to take sufficient bail (*Mason v. Hutchings*, 20 Maine, 77).

<sup>1</sup> *Hindal v. Blades*, 1 Marsh. 27; 5 Taunt. 225.

<sup>2</sup> *Hindal v. Blades*, 1 Marsh. 27; 5 Taunt. 225; see *Sutton v. Waite*, 8 J. B. Moore, 27.

<sup>3</sup> *Scott v. Waithman*, 3 Stark. 168; *Saunders v. Darling*, Bull. N. P. 60.

<sup>4</sup> *Jeffery v. Bastard*, 4 Ad. & El. 823. In that case, it appeared that persons of respectable appearance were brought to the sheriff's office, as sureties, by the clerk of the attorney of the party replevying, their circumstances being unknown both to the attorneys and to the sheriff's clerk in charge. The latter caused the sureties to make affidavit in detail as to their sufficiency, with which he was satisfied. Held, that the jury was justified in finding that the inquiry made did not excuse the sheriff. And the penalty of the bond is the limit of the damages (see *Yea v. Lethbridge*, 4 T. R. 433; *Evans v. Brander*, 2 H. Blacks. 547; *Newbert v. Cunningham*, 50 Maine, 231; *Young v. Hosmer*, 11 Mass. 89; *Shackford v. Goodwin*, 13 Id. 187; *Gerrish v. Edson*, 1 N. H. 82).

provided that in an action of replevin the defendant may, within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the plaintiff's sureties. "If he fail to do so, he shall be deemed to have waived all objection to them. \* \* \* And the sheriff shall be responsible for the sufficiency of the sureties, until the objection to them is either waived as above provided, or until they shall justify, or new sureties shall be substituted and justify."<sup>1</sup> It is also provided that the defendant's sureties, upon a notice to the plaintiff of not less than two, nor more than six days, shall justify, and "the sheriff shall be responsible for the defendant's sureties until they justify, or until justification is completed or expressly waived, and may retain the property until that time."<sup>2</sup>

§ 542. Slight evidence of the insufficiency of sureties has been held to throw the burden of proof on the sheriff, who must be supposed to know the sureties, and who ought to have taken care of their sufficiency.<sup>3</sup> Thus, it is enough for this purpose to show that the sureties were in debt, and though requested, had not paid,<sup>4</sup> or that there were unsatisfied executions against them, known to the sheriff.<sup>5</sup> But in Pennsylvania, it has been held that the return of an execution against the property of a surety unsatisfied, is not conclusive evidence against the sheriff in an action against him for taking insufficient sureties.<sup>6</sup>

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<sup>1</sup> N. Y. Code of Pro. § 210.

<sup>2</sup> *Ib.* § 212. In New York, before the adoption of the Code, no action would lie against a sheriff for insufficiency of sureties in a replevin bond, until after their sufficiency had been tested by an exception, and they, or others offered in their place, had had an opportunity to justify (*Westervelt v. Bell*, 19 Wend. 531).

<sup>3</sup> *Sanders v. Darling*, Bull. N. P. 60.

<sup>4</sup> *Gwyllim v. Scholey*, 6 Esp. 100.

<sup>5</sup> *Scott v. Waithman*, 3 Stark. 168.

<sup>6</sup> *Myers v. Clark*, 3 Watts & Serg. 535.

And in Kentucky, it has been held that it is necessary to aver and prove the inability of the principal, as well as the insufficiency of the sureties.<sup>1</sup> If the sureties were good at the time they were taken, though they subsequently become bankrupt, the sheriff will not be liable.<sup>2</sup>

§ 543. A sheriff, from whom property levied on by him has been taken under a replevin, in which he obtains judgment, is as much bound to prosecute the sureties in the replevin bond, as he was to levy upon the property in the first instance. If, without excuse, he neglects so to prosecute, he is liable to the creditor for the amount of the debt.<sup>3</sup>

§ 544. Another form of liability to which sheriffs are subjected is for an escape of debtors arrested on civil process. At common law, the only remedy for an escape was by an action on the case;<sup>4</sup> but in addition to this remedy, statutes have been enacted in England, and in many of the states of the Union, giving an action of debt against a sheriff for an escape of a debtor taken on final process. These statutes do not, unless they contain express language to that effect, take away the common law remedy.<sup>5</sup> They give to the party, at whose suit a prisoner was committed, a right to recover for his escape on final process, irrespective of the actual loss or damage, the precise amount of the original judgment, as a penalty for the

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<sup>1</sup> *Fisher v. Davis*, Litt. Sel. Cas. [Ky.] 132.

<sup>2</sup> *Commonwealth v. Thompson*, 3 Dana, 301. The measure of damages against a sheriff in an action for taking insufficient sureties in replevin, is double the goods distrained (see *Evans v. Brander*, 2 H. Blacks. 547; approved in *Baker v. Garrett*, 3 Bing. 56; and see *Scott v. Waithman*, 3 Stark. 168).

<sup>3</sup> *Swezey v. Lott*, 21 N. Y. 481.

<sup>4</sup> See *Rawson v. Dole*, 2 Johns. 454; *Thomas v. Weed*, 14 Id. 255; *Littlefield v. Brown*, 1 Wend. 398; *Duncan v. Klinefelter*, 5 Watts, 141, 144; *Steere v. Field*, 2 Mason, 513, per Story, J.

<sup>5</sup> *Barnes v. Willet*, 35 Barb. 514; 12 Abb. Pr. 448; affirming S. C., 11 Id. 225.

carelessness or misconduct of the sheriff.<sup>1</sup> The action of debt is universally limited to cases of escape from final process. For escapes from mesne process the only remedy is still an action on the case; and in such an action, the amount of debt is only *prima facie* the measure of the creditor's damages, and the sheriff may set up matters, such as the insolvency of the prisoner, &c., in mitigation of damages.<sup>2</sup> Indeed, it is well settled that no action can be maintained against a sheriff for the escape of a prisoner in custody on mesne process, unless the plaintiff has sustained actual damage.<sup>3</sup> If the action is in case, for an escape even on final process, the sheriff may also show the insolvency of the debtor in mitigation of damages.<sup>4</sup> In England<sup>5</sup> and Massachusetts<sup>6</sup> the action of debt for an escape has been abolished, and the action is now for damages. In New York, Ohio, and the other states in which the old forms of action have been abolished, the right of a creditor to elect between an action in which he may collect the debt as a penalty from the sheriff, and an action for his actual damages, remains unaffected.<sup>7</sup>

<sup>1</sup> Per Sutherland, J., *Barnes v. Willet*, 11 Abb. Pr. 225; and see *Bonafous v. Walker*, 2 T. R. 126; *Rawson v. Dole*, 2 Johns. 454; *Van Slyck v. Hogeboom*, 6 Id. 270; *Renick v. Orser*, 4 Bosw. 384; *McCreery v. Willett*, Ib. 643; *Hutchinson v. Brand*, 9 N. Y. 209; *Porter v. Sayward*, 7 Mass. 377; *Shewel v. Fell*, 3 Yeates, 17; 4 Id. 47; *Jones v. Blair*, 4 McCord, 281; *Futch v. Walker*, 1 Bailey, 98.

<sup>2</sup> *Patterson v. Westervelt*, 17 Wend. 543; *Latham v. Westervelt*, 26 Barb. 256; *Loosey v. Orser*, 4 Bosw. 391.

<sup>3</sup> *Williams v. Mostyn*, 4 Mees. & W. 145; *Lowell v. Bellows*, 7 N. H. 375; *Smith v. Hart*, 1 Bay, 395; *Blanding v. Rogers*, 2 Brevard, 394; *Potter v. Lansing*, 1 Johns. 214, 223; *Russell v. Turner*, 7 Id. 188; *Burrell v. Lithgow*, 2 Mass. 526; *Clark v. Smith*, 9 Conn. 379; see *Brooks v. Hoyt*, 6 Pick. 468.

<sup>4</sup> *Hootman v. Shriner*, 15 Ohio St. 43.

<sup>5</sup> *Arden v. Goodacre*, 11 C. B. 371; *Macrae v. Clarke*, Law Rep. 1 C. P. 403. Therefore, it was held in the last case, that the jury, in estimating the value of the custody, may take into account not only the debtor's own means, but all reasonable chances, founded on his position in life and surrounding circumstances, that any part of the debt would have been paid had he remained in custody.

<sup>6</sup> *Chase v. Keyes*, 2 Gray, 214.

<sup>7</sup> *Barnes v. Willet*, 12 Abb. Pr. 448; 35 Barb. 514; *McCreery v. Willett*, 4 Bosw. 643; affirmed, 23 How. Pr. 129; *Daguerre v. Orser*, 15 Abb. Pr. 113.

§ 545. Every liberty given to a prisoner, not authorized by law, is an escape.<sup>1</sup> If a defendant taken in execution is afterward allowed to be at large, even for the shortest time, though before the return of the writ, the sheriff is liable.<sup>2</sup> But to constitute an escape, there must be some agency of the prisoner employed, or some wrongful act by another, against whom the law gives a remedy.<sup>3</sup>

§ 546. The common law rule seems to have been that nothing but the act of God or the king's enemies would excuse a sheriff for an escape of a prisoner committed on execution.<sup>4</sup> By the modern rule, the exceptions in favor of the sheriff of the acts of God and the king's enemies have been enlarged so as to include the act of the law; and where a prisoner is taken from the custody of the sheriff by virtue of an order of a court or officer of competent jurisdiction, or of some legal process which affords a justification to the officer executing it, and against whom the sheriff can have no remedy or recompense, it is not an escape.<sup>5</sup> Thus, taking a prisoner to court on a *habeas corpus ad testificandum* to testify is not an escape.<sup>6</sup> So a discharge of the prisoner by the order of a court or judicial

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<sup>1</sup> Colby v. Sampson, 5 Mass. 310, per Parsons, C. J.

<sup>2</sup> Hawkins v. Plover, 2 W. Blacks. 1048. If a sheriff's officer, having taken a prisoner in execution, permit him to go about with a follower of his, before he takes him to prison, it is an escape (Benton v. Sutton, 1 Bos. & P. 24).

<sup>3</sup> Wilckens v. Willet, 1 Keyes [N. Y.] 521; affirming S. C., *sub nom.* Wickelhausen v. Willett, 12 Abb. Pr. 319; 21 How. Pr. 40; Baxter v. Taber, 4 Mass. 361; Cargill v. Taylor, 10 Id. 206.

<sup>4</sup> Alsept v. Eyles, 2 H. Blacks. 108. If the jail took fire, and the prisoners by means thereof escaped, the sheriff was excused if the fire was the act of God (Bac. Abr., tit. Escape in C. Cas. H.) And in Southcote's Case (4 Co. 84), it is laid down as the rule that "if traitors break a prison, it shall not discharge the jailer; otherwise, if the king's enemies of another kingdom. For in the one case he may have his remedy and recompense, and in the other case not."

<sup>5</sup> Per Johnson, J., Wilckens v. Willet, 1 Keyes [N. Y.] 521; Way v. Wright, 5 Metc. 380; Fuller v. Davis, 1 Gray, 612.

<sup>6</sup> Noble v. Smith, 5 Johns. 356; Hassam v. Griffin, 18 Id. 47; Wattles v. Marsh, 5 Cow. 176; Martin v. Wood, 7 Wend. 132; Matter of Price, 4 East, 587. But a mere subpoena, it seems, would not be a justification to the sheriff for allowing the prisoner to leave the jail (Wilckens v. Willet, 1 Keyes [N. Y.] 521, 530).

officer of competent jurisdiction is a good defense,<sup>1</sup> if the order is regular on its face.<sup>2</sup> So, where he has been released by an act of the legislature,<sup>3</sup> or is taken by virtue of the warrant of the speaker of the House of Representatives.<sup>4</sup>

§ 547. The sheriff cannot go behind the judgment, and inquire whether the proceedings were or were not regular. The judgment concludes him as well as the defendant against whom it is rendered. But in an action for an escape, the sheriff may always show that the judgment debtor was privileged from arrest,<sup>5</sup> or that the process under which the prisoner was arrested was void;<sup>6</sup> for it is obvious that the creditor, having no right to detain the debtor, has lost nothing by his escape.

§ 548. As we have before remarked, the sheriff will have done his duty if he produces the body of the prisoner taken on *mesne* process on the return day, notwithstanding that in the mean time the prisoner may have been at large.<sup>7</sup> But a recapture or a voluntary return by the prisoner after the return day, in a *mesne* process, though before suit brought, is no defense to the sheriff in an action for an escape.<sup>8</sup> In cases of arrest on final process, the prisoner may be retaken after a negligent escape, but not after a *voluntary* escape.<sup>9</sup>

<sup>1</sup> *Cantillon v. Graves*, 8 Johns. 472; *Hart v. Dubois*, 20 Wend. 236; *Wiles v. Brown*, 3 Barb. 87.

<sup>2</sup> *Bush v. Pettibone*, 4 N. Y. 300; *Cable v. Cooper*, 15 Johns. 152; *Field v. Jones*, 9 East, 151.

<sup>3</sup> *Mason v. Haille*, 12 Whart. 370.

<sup>4</sup> *Wilckens v. Willet*, 1 Keyes [N. Y.] 521.

<sup>5</sup> *Ginochio v. Orser*, 1 Abb. Pr. 433; *Bissell v. Kip*, 5 Johns. 89; *Scott v. Shaw*, 13 Id. 378; *Spafford v. Goodell*, 3 McLean, 97.

<sup>6</sup> *Carpentier v. Willet*, 1 Keyes [N. Y.] 510; S. C., less fully, 31 N. Y. 90; affirming S. C., 6 Bosw. 25; *Phelps v. Barton*, 13 Wend. 18; *Horton v. Hendershot*, 1 Hill, 118; *Ray v. Hogeboom*, 11 Johns. 433; *Albee v. Ward*, 8 Mass. 79; *Howard v. Crawford*, 15 Geo. 423; *Contant v. Chapman*, 2 Q. B. 771.

<sup>7</sup> *Ante*, § 526.

<sup>8</sup> *Stone v. Woods*, 5 Johns. 182.

<sup>9</sup> *Butler v. Washburn*, 5 Foster, 251.

## CHAPTER XXX.

### TELEGRAPHS.

- Sec. 549. Unsettled state of the law.  
550. Nature of the business.  
551. Its peculiarities.  
552. Risks to which it is exposed.  
553. Obligation not purely in contract.  
554. Telegraph companies common carriers.  
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564. Certain reasonable rules considered.  
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566. Notice of rules necessary.  
567. Limitation of liability by notice.  
568. Effect of notice of rules.  
569. Limitation of liability by contract.  
570. How contract may be made.  
571. Interpretation of contracts.

§ 549. The introduction of the telegraph is so recent, its use yet so limited, and the reported decisions upon the rights and obligations of telegraph companies consequently so few and so inconsistent, that it is impossible to state the law upon the subject with that dogmatic certainty which is desirable. The reported opinions consist very largely of *obiter dicta*; they are not harmonious; and they do not indicate that degree of care and consideration on the part of the courts which is to be desired in laying the foundations of a new branch of the law. We shall, therefore, express our own opinions freely, except where there happens to be such entire unison of judicial opinion as will justify us in regarding a question as finally settled.

§ 550. In order to approach this subject intelligently, it is necessary at the outset to review the general nature and peculiar characteristics of the telegraph business. In almost all cases upon which any litigation can arise, a single telegraphic operation includes eight distinguishable acts, namely: (1.) The reception of a written message; (2.) The translation of this message into the telegraphic vocabulary, if we may use that phrase; (3.) The impression of the translated message upon the machine connecting with the wire; (4.) The transmission of the message along the wire; (5.) The reception into the mind of the operator at the other end, of the sounds or marks by which the telegraph announces the message; (6.) The mental translation of these sounds or marks into ordinary language; (7.) The writing out of the message thus received; (8.) The delivery of the written message to the person for whom it is destined. Where the printing telegraph is used, the sixth and seventh of these acts are dispensed with, as the telegraph prints off the identical message which is delivered. In the great majority of telegraph offices, however, the message is communicated to the receiving operator only by sound.

§ 551. In so far as the original reception and final delivery of messages are concerned, the business of a telegraph company is not peculiar or difficult. But the other part of its work is *sui generis*. The message must be put upon the wire by a series of longer or shorter pressures of the operator's finger. If he keeps his finger down a second too long, or raises it a second too soon, he will destroy the meaning of the message, as will be seen when we describe the form in which it arrives at the other end of the line. The electricity which is let loose by the operator's finger then passes along the wire, and delivers a series of shocks at every office, corresponding in length with the fingering of the operator. The particular operator who, by a pecu-



liar signal, has been warned to prepare for messages, then listens to a series of snapping sounds, unintelligible to untrained ears, but which he is able to translate into letters of the English alphabet. Or, as was formerly the case in all offices, and is now the practice in some, his machine slowly rolls off a narrow slip of paper, printed somewhat after this fashion: — — — — — and so on at great length. Now we will suppose that this sign means “casks.” In that case, — — — — — will probably mean “sacks:” a difference of which the indications are very slight; but which may, and in one case<sup>1</sup> did, involve a loss of thousands of dollars.

§ 552. It will be seen, from this very brief survey, how delicate are the materials with which a telegraph company must work, and how much exposed it is to the risk of mistake and interruption. The least inattention on the part of the operator at either end may cause a monstrous perversion of the message; while a storm, or a surcharge of electricity in the atmosphere, may interrupt communication upon the wires altogether. The injury thus caused to the parties interested in a message is frequently great—sometimes enormous. An error in a message will generally make it unintelligible, in which case the remedy is easy: the receiver telegraphing back for a correction. But if the mistake leaves the message intelligible, the error is attended with more dangerous consequences, as the receiver suspects nothing, and makes no inquiries, so that, unless special orders have been given to him to repeat the message, neither operator discovers that any mistake has been made.

§ 553. The first question to be determined in respect to the liability of telegraph companies for negligence is,

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<sup>1</sup> Leonard v. N. Y., Albany &c. Telegraph Co., 41 N. Y. 544.

whether their obligations are or are not founded purely and necessarily upon contracts with those who employ them. It has been said that they are.<sup>1</sup> But we cannot agree with this view. These companies are chartered by the state for public purposes; they are allowed to take private property on the pretext of public use; they are required by law to receive and transmit messages; and we can see no reason for doubting that they are liable for negligence in such transmission, independently of any contract, although, as a matter of fact, they always insist upon defining their obligations by contract; and of course, where that is done, their statutory or common law obligations are merged in the contract. Our views are, moreover, supported by the preponderance of authority.<sup>2</sup>

§ 554. The courts have frequently discussed the question, whether telegraph companies are or are not common carriers; and it has been generally said that they are not. But the language of the judges in these cases was unnecessarily broad; the real question before them being, at the most, whether telegraph companies were subject to the strict responsibility of common carriers of goods: a perfectly distinguishable proposition, which we shall presently consider. Moreover, in nearly all these cases, judgment was finally rendered against the telegraph companies; and the opinions of the courts were, therefore, expressed without that valuable restraint which arises from a consciousness that the words used are really deciding an actual controversy.<sup>3</sup> We do not, upon the whole, think that there is

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<sup>1</sup> *Playford v. United Kingdom Tel. Co.*, Law Rep. 4 Q. B. 706; *Allen, J.*, in *Leonard v. N. Y., Albany &c. Telegraph Co.*, MS. This is not the decision which, in the same case, was affirmed in the Court of Appeals.

<sup>2</sup> *De Rutte v. N. Y., Albany &c. Tel. Co.*, 1 Daly, 547; *N. Y. & Washington Tel. Co. v. Dryburg*, 35 Penn. St. 298; *Parks v. Alta California Tel. Co.*, 13 Cal. 422; *Western Union Tel. Co. v. Carew*, 15 Mich. 525.

<sup>3</sup> See *Leonard v. N. Y., Albany &c. Telegraph Co.*, 41 N. Y. 544; *Breese v. U. S. Tel. Co.*, 45 Barb. 274; *Birney v. N. Y. & Washington Tel. Co.*, 18 Md. 341; *Western U. Tel. Co. v. Carew*, 15 Mich. 525.

a single decision necessarily inconsistent with the doctrine that a telegraph company is a common carrier of some sort; while, in some opinions, which are framed with a clearer perception of the difference between the two questions, the applicability of much of the law of common carriers to telegraphers is expressly recognized.<sup>1</sup> In the absence of any controlling decisions upon the point, we feel at liberty to express our own opinion that telegraph companies are common carriers of messages, subject to all the rules which are in their nature applicable to all classes of common carriers. The importance of this question will appear when we come to consider the power of telegraph companies to limit their liabilities. We shall not enlarge upon this point, nor undertake to state what these rules are; for these subjects do not come within our province any further than as they affect the rules of liability of these companies for negligence.

§ 555. Our reasons for the view we take are, in a condensed form, as follows: A telegraph company always undertakes a public service, and takes private property in a way that can only be allowed on the plea of public use. This makes it a *common* carrier, if it is a carrier at all. If it did not serve the public at large, it could not constitutionally erect a pole or lay a wire without the consent of the land-owner. It receives a written message, which it copies at a great distance by means of electricity, and then undertakes to deliver this copy of the message to the person to whom it is addressed. In making this delivery, it is literally a *carrier*, for the delivery-clerk carries a sealed envelope, containing the message, to its address. If, as these companies claim, they are mere agents of the senders of messages, in printing or sounding messages at the end of a wire, then the message thus printed, or taken down

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<sup>1</sup> See *Ellis v. American Tel. Co.*, 13 Allen, 226.

from the sound, is clearly the property of the sender, and the conveyance of that message thereafter to its address is beyond doubt a carriage of the sender's property. But even the transmission of the message over the wire may fairly be called an act of carriage. Something, however intangible, actually passes over the wire. It is not, we admit, the paper on which the sender wrote the message; but it is a substitute for that, amounting in essence to the same thing. The whole value of the paper consists in its ideas; and these ideas the company undertakes to place at a distance, and does so by means of the continuous transportation of a material substance.

§ 556. It is too well settled to admit of further discussion, that, so far as the transmission of messages by the use of electricity is concerned, telegraph companies are not subject to the same severe rule of responsibility as common carriers of merchandise, but are liable only for negligence or willful misconduct.<sup>1</sup> Nor have we any desire to complain of this rule: on the contrary, it seems to us eminently just. A telegraph wire is exposed to the constant interference of strangers, as well as to dangers which would fairly come within the old definition of the "act of God," but which could not be satisfactorily proved to do so. It would be harsh and unwise to subject telegraphers to a liability so much beyond any reasonable bounds. It has never yet been distinctly adjudged that this limitation of liability extends also to the delivery of messages, after they have been received and reduced to writing; but we judge, from the spirit in which the courts have dealt with the whole subject, that they will hold telegraph companies

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<sup>1</sup> Leonard v. N. Y., Albany &c. Tel. Co., 41 N. Y. 544; Breese v. U. S. Tel. Co., 45 Barb. 274; Birney v. N. Y. & Washington Tel. Co., 18 Md. 341; De Rutte v. N. Y., Albany &c. Tel. Co., 1 Daly, 547; N. Y. & Washington Tel. Co. v. Dryburg, 35 Penn. St. 298; Ellis v. American Tel. Co., 13 Allen, 226; Western U. Tel. Co. v. Carew, 15 Mich. 525.

liable only for negligence, even in this branch of the business.

§ 557. The degree of care which a telegraph company is bound to use may be called "ordinary," if we measure the meaning of that word solely by reference to the kind of care which a man of ordinary prudence would use in telegraphing for himself. But as compared with almost any other kind of business, the care required of a telegrapher would be called "great care." The telegraph is employed for the plain purpose of securing the utmost speed. It is never used for any thing which will bear delay, and is rarely used for any matters of trivial importance. Messages are drawn up in a very condensed style, and with an effort to express much matter in few words. Any prudent man, who should be employed to transmit or receive such a message, which he did not fully understand, but which he knew was made out in his interest, would use extreme care in signaling or listening to it (as the case might be), and would be exceedingly prompt in forwarding it. That which he would do from choice, the telegraph company must do in the service of others from a sense of duty. And for the consequences of any failure to do so, it will be responsible.

§ 558. The necessity of great condensation in the composition of telegrams makes it a duty peculiarly imperative upon every telegrapher to forward messages exactly as they are sent. He is not responsible for the inability of the receiver to comprehend them, no matter how unintelligible they may be; while he will be responsible for any loss which may be sustained, by either the sender or the receiver of the message, in consequence of his alteration of its terms from those in which it was originally written. He may, as we have seen, refuse to take an illegible message, and may demand any reasonable explanation for the

purpose of assuring himself that he has read the message rightly ; but no degree of good faith or good intention will justify him in adding to or detracting from the precise words and syllables of the message.<sup>1</sup>

§ 559. The sound rule of evidence, which puts the burden of proof upon the party presumptively best acquainted with the facts, requires that, in an action against a telegraph company, proof that it received a message which it did not properly deliver, or which it delivered in a distorted form, should be deemed sufficient to raise a presumption of negligence on its part, and to cast upon it the burden of proving that it used due care and diligence in transmitting the message. As a general rule, where an error is caused by atmospheric influences, or other causes beyond the control of the operators, they are aware at the time of the perturbation thus caused, and have it in their power to note the fact, as a precaution in case of future inquiries. They can tell, with wonderful accuracy, the place at which the wires are interfered with. They can and do keep the original message, and a copy of that which is received at the other end of the wire ; and by a comparison of these, they can ascertain whether the error occurred in the electric transmission of the message. They have thus unusual facilities for disproving negligence, if they were not in fact negligent ; and the plaintiff, who is wholly in the dark as to all these matters, ought not to be called upon for affirmative proof in respect to them.

§ 560. It has been held that a telegraph company is

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<sup>1</sup> N. Y. & Washington Tel. Co. v. Dryburg, 35 Penn. St. 298. This case affords a very strong illustration of the rule. The telegraph company received a message calling for "eight hand bouquets." The writing not being very distinct, the operator mistook "*hand*" for "*hund*" (a mistake which the writing of many persons would fully justify); and, naturally enough, he thought that "*hund*" was a mistake for "*hundred*." He therefore telegraphed for "eight *hundred* bouquets," which were sent, involving, of course, a great loss. Held, that the company was liable for the damage.

responsible only to the sender of a message for negligence in its transmission, so far as such negligence consists in non-feasance merely. The receiver of the message is not (except in peculiar cases) the employer of the company, even though he pay for the message on delivery. The fact of such payment tends to prove that the message was sent for his benefit; but even if the latter fact were conclusively proved, it would only show that the sender of the message employed the telegrapher to render a service for the benefit of the receiver: the main fact of an employment by the sender remaining unchanged. And, according to the theory of the cases cited, a stranger to the contract cannot sue the telegrapher for its breach, however much he may be prejudiced thereby.<sup>1</sup> We are unable, however, to reconcile this doctrine with the more recent and well-considered decisions of the New York Court of Appeals, in which it was settled, as the law of that state, that where two persons made a contract expressly for the benefit of a third person, such third person might sue upon it.<sup>2</sup> It is true that the particular contracts, upon which a stranger was thus allowed to sue, provided simply for the payment of money to him; but this can afford no ground for distinguishing between the cases, especially as there was no specific fund, and, therefore, no trust involved. We think, therefore, that upon the principle of these decisions (of which we fully approve), a telegraph company is responsible for its negligence to a person to whom a message is addressed, as well as to the sender. If it were not so, it is obvious that the receivers of telegrams would often sustain great damage without any means of redress. They could not recover

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<sup>1</sup> *Playford v. United Kingdom Tel. Co.*, Law Rep. 4 Q. B. 706; *Leonard v. N. Y., Albany &c. Tel. Co.*, per Allen, J. The opposite opinion was expressed in *N. Y. & Washington Tel. Co. v. Dryburg*, 35 Penn. St. 298.

<sup>2</sup> *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178; *Steman v. Harrison*, 42 Penn. St. 49.

from the senders of the messages, because the latter would not be in fault; and the senders could not recover from the companies any compensation for damage which they had not sustained. Thus, for example, if A. telegraphs to B. that he will sell goods at a certain price, and B. sends a telegram in reply, accepting the offer, which is never delivered, and A. having, consequently, sold the goods to another person, is compelled (as he would be)<sup>1</sup> to make good to B. any difference in price, it is clear that the loss happens through the fault of the telegraph company; yet B. cannot sue the company, though he sent the message, because all his rights were secured by that act; and unless A., to whom the message was addressed, can sue, the company, which is the only party really in fault, will escape all liability. It may be considered settled law that a telegraph company is responsible to the receiver of a message for any *misfeasance* by which he is injured, such, for example, as the alteration of a message.<sup>2</sup>

§ 561. Where a message is transmitted over several connecting lines, belonging to different companies, and an injury is caused by the negligence of a company other than the one to which the message was first delivered, a very difficult question is presented, which (under another form) has been the subject of many inconsistent and inconsiderate decisions. The rule which prevails in any state in respect to the liability of carriers in such cases will of course govern this case; but unfortunately it is almost impossible to tell what that rule is, except in England. There, it is at last settled that, in the absence of a special contract, not

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<sup>1</sup> Trevor v. Wood, 36 N. Y. 307.

<sup>2</sup> N. Y. & Washington Tel. Co. v. Dryburg, 35 Penn. St. 298; Sailer v. Western Union Tel. Co., 3 Am. Law Rev. 777. The company is not liable, however, for a payment made by the receiver of a message, without any legal duty resting upon him to pay (Rose v. U. S. Tel. Co., 3 Abb. N. S. 408; 34 How. Pr. 308).



only is the first carrier liable to the consignor,<sup>1</sup> but no other carrier is;<sup>2</sup> and this is so, even though the second carrier takes the goods out of the kingdom, and the loss occurs there.<sup>3</sup> In Massachusetts, Connecticut, and Vermont, the opposite rule prevails, and the first carrier is not liable for the negligence of any other, unless he has assumed such liability by special contract.<sup>4</sup> And in Connecticut, the courts have gone so far as to hold, not only that there is in all cases a presumption that the first carrier undertakes to be responsible only for his own default,<sup>5</sup> but also that a corporation created by the laws of that state has no power to contract for the delivery of goods beyond the limits of the state and the end of its legally authorized route.<sup>6</sup> This decision is based upon grounds too narrow and technical to command respect in the courts of other states. In New York, it is settled that a carrier receiving goods addressed to a point beyond his own route, may relieve himself from liability for the negligence of a connecting carrier, by proof that his uniform mode of doing business was to undertake only for the delivery of goods at the end of his route to other carriers, without showing that this usage of his business was known to the consignor.<sup>7</sup> It has been ex-

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<sup>1</sup> *Muschamp v. Lancaster &c. R. Co.*, 8 Mees. & W. 421; *Southern v. South Staffordshire R. Co.*, 8 Exch. 341.

<sup>2</sup> *Bristol &c. R. Co. v. Collins*, 7 H. L. Cas. 194; 5 Hurlst. & N. [Am. ed.] 969; affirming S. C., 11 Exch. 790; and reversing S. C., 1 Hurlst. & N. 517; *Coxon v. Great Western R. Co.*, 5 Hurlst. & N. 274; *Mytton v. Midland R. Co.*, 4 Hurlst. & N. 615.

<sup>3</sup> *Crouch v. London & Northwestern R. Co.*, 14 C. B. 255.

<sup>4</sup> *Nutting v. Conn. River R. Co.*, 1 Gray, 502; *Hood v. N. Y. & New Haven R. Co.*, 22 Conn. 1; *Id.* 502; *Farmers' & Mechanics' Bank v. Champlain Transp. Co.*, 23 Verm. 186.

<sup>5</sup> *Hood v. Conn. River R. Co.*, 22 Conn. 1; *Converse v. Norwich & N. Y. Transp. Co.*, 33 Conn. 166.

<sup>6</sup> *Hood v. Conn. River R. Co.*, 22 Conn. 1; *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Conn. 468.

<sup>7</sup> *Van Santvoord v. St. John*, 6 Hill, 157; reversing S. C., 25 Wend. 660; *Hempstead v. N. Y. Central R. Co.*, 28 Barb. 485. And the same rule is law in Vermont (*Farmers' & Mechanics' Bank v. Champlain Transp. Co.*, 23 Verm. 186).

pressly adjudged, in that state, that a telegraph company, receiving a message directed to a place beyond its lines, and taking payment for the entire service, is presumptively liable to the sender for the negligence of all connecting lines.<sup>1</sup> On the other hand, it has also been adjudged that the sender of a message can recover damages from the company actually in fault, although it be one with which he had no direct dealing.<sup>2</sup> This ruling is in plain opposition to the settled rule of English law; and it is within our knowledge that the last English decisions were not brought to the notice of the Court of Appeals, when it passed upon the question. The only ground upon which the decision can be supported, in our judgment, is that the statutes incorporating telegraph companies make them liable to every one injured by their neglect. If the companies' liability rested only upon contract, we think that the English decisions would lay down the only rule consistent with the settled rule, that the principal only, and not the agent, must be sued for a breach of contract;<sup>3</sup> for we are unable to see how the company first receiving the message can be considered the agent of the companies subsequently receiving it from the former. As a matter of fact, there is no doubt that the latter companies do not intend to confer upon the company from which they receive a message any power to represent them, or to make any contract binding upon them; and we are unaware of any rule at law which

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<sup>1</sup> *De Rutte v. Albany & Buffalo Tel. Co.*, 1 Daly, 547. An adverse decision in Canada (*Stevenson v. Montreal Tel. Co.*, 16 U. C. 530) was based upon the judgment of the Exchequer Chamber in *Collins v. Bristol & Exeter R. Co.* (1 Hurlst. & N. 517), which was reversed upon this very point by the House of Lords (7 H. L. Cas. 194; 5 Hurlst. & N. [Am. ed.] 969). The courts in Canada would doubtless now feel bound to follow the House of Lords.

<sup>2</sup> *Leonard v. N. Y., Albany & c. Tel. Co.*, 41 N. Y. 544; *Baldwin v. U. S. Tel. Co.*, 1 Lansing, 125; see S. C., on demurrer, 54 Barb. 505; 6 Abb. N. S. 405. In the former case, the defendant had no real interest in contesting this point, having indemnified the company in fault.

<sup>3</sup> *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; *Denny v. Manhattan Bank*, 2 Denio, 115; and many other cases.

compels one company to employ another as its agent against its will—much less of any rule which provides not merely that every company *must*, but that it actually *does*, authorize every other company to act as its agent. The subject might be pursued much further; but as it belongs to a *treatise* on the law of carriers, rather than to telegraphs, we refer our readers to other sources of information.<sup>1</sup>

§ 562. The charters of most telegraph companies empower them to establish rules for the management of their business; and generally their charters only require them to take messages subject to such rules and regulations as the companies may establish. It seems to have been generally taken for granted that one of the chief purposes for which this power is conferred upon telegraph companies is to enable them to relieve themselves from the liabilities imposed upon them by law. It may be too late to controvert this position; yet, as it has never been established by argument, it shall not pass without the condemnation which it deserves, nor have such little support as our tacit indorsement might afford. In view of the salutary, well-settled, but often ignored principle, that grants of special privileges are to be construed strictly against the grantee,<sup>2</sup> we should have supposed it clear that the rules which these companies are allowed to make are simply regulations concerning the mode and form in which messages are to be delivered to them, the time of payment, the amount of compensation, the mode of acknowledging the receipt of messages, and the like matters. In short, these rules, it seems to us, ought to be rules for the conduct of

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<sup>1</sup> See particularly Redfield on Carriers, ch. xiv.

<sup>2</sup> *Stourbridge Canal Co. v. Wheeley*, 2 Barn. & Ad. 792; *Rice v. Railroad Co.*, 1 Black, 358; *Perrine v. Chesapeake & Del. Canal Co.*, 9 How. [U. S.] 172; *Stormfeltz v. Manor Turnpike Co.*, 13 Penn. St. 555; *Priestley v. Foulds*, 2 Man. & G. 194; *Parker v. Great Western R. Co.*, 7 Id. 253, 288.

customers, and for the facilitation of business, and not stipulations exonerating the companies from liability for their negligence. In what does this power to make rules differ from the power, universally possessed by corporations, to make by-laws? Yet does any one have the hardihood to claim that a corporation can, by a by-law, declare itself exempt from a liability imposed upon it by law, or liquidate the damages at a nominal sum? Now, the right of a traveler to use a city street is no clearer than the right of every citizen to send a telegram, upon payment of the usual charge. Why, then, should it be impossible for the city to fix its liability at fifty cents or nothing, and yet possible for the telegraph company to do so, even when the customer has, by obtaining a repetition of the message, made it absolutely certain that there is no excuse for its non-delivery.

§ 563. But even conceding that telegraph companies have a chartered right to limit their liability by rules, it still remains to be considered whether they have the right to impose unreasonable conditions. In Great Britain and Ireland, the statute expressly requires that the rules of telegraph companies shall be reasonable;<sup>1</sup> but in this country there is rarely or never to be found any such qualification in the statutes. The courts, however, are generally inclined to construe the statutes as though the word "reasonable" was inserted;<sup>2</sup> and this construction is abundantly justified by precedent; it being a familiar rule of the common law that contracts are to receive such a construction as will make them reasonable, if possible. It cannot surely be maintained that the legislature, by thus permitting telegraph companies to establish regulations for the transmission of messages, meant to or did empower

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<sup>1</sup> Stat. 16 & 17 Vic., c. 203, § 66.

<sup>2</sup> *Ellis v. American Tel. Co.*, 13 Allen, 226.

them to make such regulations as would relieve them from all obligation to carry out the very purposes for which they were chartered, namely, the transmission of messages for the public. Yet the companies have universally adopted rules which cannot be sustained without involving this conclusion. And the language of the courts has sometimes seemed to support it.

§ 564. Among the common regulations of telegraph companies which we consider reasonable, are those which require all messages to be in Roman letters, legibly written, without abbreviations or figures, to be signed with the name of the sender, and to contain the full and precise address of the person intended to receive the message. So the company has a right to require a written acknowledgment from the receiver of the message, as a condition of delivery. We do not think that the company has a right to lay down a rule absolutely excluding all messages not in the English language, or not intelligible to the operator; but a rule prescribing a moderate extra charge for messages in cipher, or in a foreign language, would be perfectly reasonable. Roman letters may be properly made an indispensable qualification, because telegraphers usually have no other alphabet in use, and cannot justly be expected or required to have any other.<sup>1</sup>

§ 565. Among the rules which we consider highly unreasonable and unjust (if it is to be regarded as a "rule" at all), is one which it has become usual for telegraph companies to make, exempting themselves from all liability for the non-delivery of unrepeated messages, and from any greater liability in respect to repeated messages, than for the mere repayment of the money paid for transmission.

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<sup>1</sup> See the remarks of Woodward, J., upon this point, in *N. Y. & Washington Tel. Co. v. Dryburg*, 35 Penn. St. 298.

This rule, if valid, enables a telegraph company to exercise its own pleasure about the delivery of a message, with absolute impunity. For, not content with the old form of their rules, which exempted the companies from liability for errors and delays, they have extended their freedom from liability to every case of the non-delivery, of a message, so that the public have not, if these rules and contracts are valid, the slightest guaranty for so much as an effort to put messages in the course of transmission,<sup>1</sup> or to attend to their reception when transmitted. And although the absolute freedom from liability thus provided for extends only to unrepeatd messages, yet the repetition of a message has not the slightest tendency to secure its safe delivery after it has been reduced to writing at the further end of the line. If, then, the company may exempt itself from all liability for non-delivery under those circumstances, on the ground that the message was not repeated once, it can as well refuse to pay damages unless the message is repeated five hundred times. Besides, the stipulation concerning repeated messages undertakes to relieve the company from all but nominal damages, so that in either case the sender of the message is deprived of all real relief unless he enters into a special contract of insurance (at rates which are purposely made so high that no one ever insures); and this, too, when the sender does not want any such guaranty as is implied in insurance, but only wants security for the use of reasonable care and diligence. We certainly think that such rules should be held void; and, being illegal in their terms and plain import, they ought not to be given effect, even in those cases which might lawfully be provided for, and which are covered by their terms. An agreement to cut off a man's

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<sup>1</sup> It has been held that such a rule is not to be interpreted so as to have this effect (*Birney v. N. Y. & Washington Tel. Co.*, 18 Md. 341); but rules could easily be devised which would secure this result.

head would not be enforced even so far as it included cutting off his hair; and no more should these rules, which aim at the nullification of the law, be enforced in cases where they will not have the full effect that was contemplated.<sup>1</sup> On the same footing stands the more ingenious rule by which the companies have latterly required that all messages should be written upon a paper containing an express assent to the foregoing conditions. And we will not believe that any court will hold a telegraph company justified in refusing a message written upon a blank paper, or accompanied by an express refusal to submit to any conditions not imposed by law.

§ 566. It has been held in Maryland, that every person dealing with a telegraph company is bound to know its rules, and is bound by them, whether he has any notice of them or not, and whether the company has published them or not.<sup>2</sup> This ruling was wholly unnecessary to the decision of the cases in which it was made, and will therefore, we trust, be repudiated even in Maryland, if the question should ever fairly arise there. But whatever may be its treatment in Maryland, we cannot doubt that a doctrine so monstrous, and so utterly unlike any thing that has passed under the name of justice among freemen of any age, will be dismissed with contempt in every other state. We cannot pay it the respect of a formal refutation. The moral sense must be weakened by giving even sober consideration to such a proposition.

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<sup>1</sup> There is nothing in any of the decisions necessarily inconsistent with these views; although it must be admitted that the courts have leaned the other way. *McAndrew v. Electric Tel. Co.* (17 C. B. 3), and *Beese v. United States Tel. Co.* (45 Barb. 274), were both cases arising on express contracts; and in both, the contracts only stipulated for exemption from liability for "errors and delays;" a phrase very different from "non-delivery from whatever cause." In both cases, the messages were delivered, and the errors were strictly telegraphic. In *United States Tel. Co. v. Gildersleeve* (29 Md. 232), it was held that the company could not, by its rules, avoid liability for gross negligence, such as an entire failure to transmit a message.

<sup>2</sup> *Birney v. N. Y. & Washington Tel. Co.*, 18 Md. 341; see *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 232.

§ 567. If we are right in holding telegraph companies to be common carriers of messages, it follows that they have no power to restrict their duties or liabilities by a mere notice,<sup>1</sup> unless there is sufficient evidence of the assent of their customers thereto to create a contract between them, or unless the provision of the companies' charters, enabling them to make rules and regulations under which messages shall be taken, is sufficient to take them out of the general rule concerning carriers.

§ 568. It has been held in Kentucky, that a telegraph company can restrict its liability, to a reasonable extent, by establishing a rule to that effect, and giving notice thereof to every customer.<sup>2</sup> And such was clearly the opinion of the Court of Common Pleas in England, although the question was not strictly before it, a special contract having been made in accordance with the rule.<sup>3</sup> It does not seem to us that any such effect ought to be given to a mere notice, even of a "rule." Even if, as appears to have been assumed, without argument, the power to lay down rules involves the power to restrict liability, we think that the only way in which such a power can be exercised is by making it a rule that all messages shall be written on a paper containing such restrictions of liability as may be determined upon, and expressing the consent of

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<sup>1</sup> Although in England carriers were allowed to limit their liabilities by public notice, yet in New York, and in most of the states of our Union, this power has been denied to them (*Cole v. Goodwin*, 19 Wend. 251; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225; *Western Transp. Co. v. Hall*, 24 Ill. 466; *Falvey v. Northern Transp. Co.*, 15 Wisc. 129; *State v. Townsend*, 37 Ala. 247; *Edwards v. Cahawba*, 14 La. Ann. 224; see *Kimball v. Rutland & Burlington R. Co.*, 26 Verm. 247; *Farmers' &c. Bank v. Champlain Trans. Co.*, 23 Verm. 186; *Camden & Amboy R. Co. v. Baldauff*, 16 Penn. St. 67; *Swindler v. Hilliard*, 2 Rich. Law, 286; *Reno v. Hogan*, 12 B. Monr. 63; *Barney v. Prentiss*, 4 Harr. & J. 317).

<sup>2</sup> *Camp v. Western Union Tel. Co.*, 1 Metc. [Ky.] 164. Where the notice was printed upon the paper signed by the sender of the message, it was held sufficient to limit the company's liability (*Wann v. Telegraph Co.*, 37 Mo. 472).

<sup>3</sup> *McAndrew v. Electric Tel. Co.*, 17 C. B. 3.



the customer thereto. Such is in fact the practice of telegraph companies generally ; and it is under contracts of this kind that almost all the questions decided in reported cases have arisen.

§ 569. The only remaining method, and, in our opinion, the *only* method, by which the liabilities of a telegraph company can be restricted, is by special contract between the company and its customer. We think, upon the whole, that the weight of authority is in favor of recognizing the validity of contracts relieving common carriers from liability for any degree of negligence, however gross,<sup>1</sup> and even for the fraud of their servants, though not of contracts relieving them from liability for their own fraud. But to make such a contract valid, it must not only have the consent of the parties, but also a consideration. The mere undertaking of the carrier to perform his ordinary service for his ordinary compensation is no consideration for a contract restricting his liability, since he neither does nor promises any thing more than he was bound to do without any such stipulation. There must be some abatement from his regular charge in order to give vitality to the special contract.<sup>2</sup> If, as we have tried to show, a telegraph company is a common carrier, these rules are, of course, applicable to it. But whether it be called a carrier or not, it is clearly engaged in a public employment, and is bound to take messages from any person desiring its services ; and it therefore occupies a position which brings it quite as much within the reason of these rules as if it were a common carrier.

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<sup>1</sup> Carr v. Lancashire &c. R. Co., 7 Exch. 707 ; Bissell v. N. Y. Central R. Co., 25 N. Y. 442 ; see Lee v. Marsh, 43 Barb. 102 ; Austin v. Manchester &c. R. Co., 10 C. B. 454 ; but compare Ashmore v. Penn. Steam &c. Co., 4 Dutch. 180 ; Camden & Amboy R. Co. v. Baldauff, 16 Penn. St. 67 ; Pennsylvania R. Co. v. McCloskey, 23 Penn. St. 526.

<sup>2</sup> See Smith v. N. Y. Central R. Co., 24 N. Y. 222 ; Bissell v. N. Y. Central R. Co., 25 N. Y. 442.

§ 570. Although, as we have said, a contract restricting liability should not be held valid unless made at a reduced rate, yet it is not necessary that the company should put its terms precisely in that form. It is enough if the substance of the rule is complied with. Thus, if the company calls its regular charge the rate at which it declines to take any responsibility, but announces that it will take the responsibility of repeated messages for a compensation fifty per cent. higher, the latter rate may, it seems, be regarded as the regular charge under the company's common law obligation, and the former as, in effect, a reduced rate. This is the invariable practice of telegraph companies; and contracts relieving them from liability, made at the lower rate, have uniformly been held valid.<sup>1</sup> The forms now in use by the companies go much further than this, and exempt them from liability even for repeated messages, unless the risk is specially insured, at rates which are not specified, and which can only be ascertained at the principal office of each company. The question has never been presented for adjudication; but, whenever it shall be, the courts must surely hold (notwithstanding a *dictum* to the contrary in Michigan)<sup>2</sup> that such a stipulation is highly unreasonable, and that one who pays for the repetition of a message, having thus paid the highest rate which the company has publicly fixed for the service, has received no consideration for his agreement to waive his legal rights.

§ 571. A rule or contract exempting a telegraph company from liability for delay in the "transmission" of a message, applies only to its transmission over the wires,

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<sup>1</sup> *McAndrew v. Electric Tel. Co.*, 17 C. B. 3; *Breese v. United States Tel. Co.*, 45 Barb. 274; *Camp v. Western Union Tel. Co.*, 1 Metc. [Ky.] 164; *Ellis v. American Tel. Co.*, 13 Allen, 226; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Wann v. Western Union Tel. Co.*, 37 Mo. 472.

<sup>2</sup> *Western Union Tel. Co. v. Carew*, 15 Mich. 525.

and not to the delivery of the message after it has been sent over the wires.<sup>1</sup> And a stipulation exempting the company from liability for the non-transmission and non-delivery of messages does not protect it from liability, where it receives a message and makes no effort whatever to forward it.<sup>2</sup> A contract or notice declaring that the company "guarantees correctness only when messages are repeated," does not relieve it in any degree from liability for negligence in respect to unrepeated messages.<sup>3</sup>

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<sup>1</sup> *Bryant v. American Tel. Co.*, 1 Daly, 547.

<sup>2</sup> *Birney v. N. Y. & Washington Tel. Co.*, 18 Md. 341.

<sup>3</sup> *Baldwin v. United States Tel. Co.*, 54 Barb. 505; 6 Abb. N. S. 405.

## CHAPTER XXXI.

### WATER-COURSES.

- Sec. 572. The subject limited.
- 573. Rights of riparian owners.
- 574. Erection of dams.
- 575. Overflowing banks of stream.
- 576. Care in construction and maintenance of dams.
- 577. Diversion of water-course.
- 578. Fouling of streams and wells.
- 579. Construction and maintenance of public sewers.
- 580. Private drains.
- 581. Interference with water.
- 582. Obstruction of navigation.
- 583. Obligation to remove wrecks.
- 584. Rules of navigation.

§ 572. A subject, for the elucidation of which a single volume would hardly suffice, could not, though it were within the scope of this work, be even outlined within the space of the few pages which we are able to devote to it. The numerous questions as to the relative rights of riparian owners to the reasonable use of the water of natural streams, and their liabilities for any unlawful interference with the rights of others, do not embrace any consideration of questions of care or want of care, and we shall do no more than barely state the general principles, referring the reader for instances of their application to the cases collected in the notes. ●

§ 573. It is a general principle that every owner of land upon a natural stream of water has a right to use the water for any reasonable purpose of his own, not inconsistent with a similar right in the owners of the land above, below, and opposite to him. He may take the water to supply his dwelling, to irrigate his land or to quench the

thirst of his cattle.<sup>1</sup> He may also use it for manufacturing purposes, such as the supplying of steam boilers, or the running of water wheels or other hydraulic works. But this is a mere privilege, running with the land, not a property in the water itself.<sup>2</sup> A riparian owner must not, therefore, seriously diminish the quantity, nor deteriorate the quality, of the water which would otherwise descend, if, by so doing, he deprives another riparian owner of the beneficial use of the water,<sup>3</sup> unless he has gained a title by

<sup>1</sup> In England, the use of the water of a stream for irrigation is not allowed (*Chasemore v. Richards*, 2 Hurlst. & N. 168; 7 H. L. Cas. 349; *Embrey v. Owen*, 6 Exch. 353; *Sampson v. Hoddinott*, 1 C. B. [N. S.] 590; see *Crossley v. Lightowler*, Law Rep. 3 Eq. 296); but in this country it is universally allowed. In *Elliot v. Fitchburg R. Co.* (10 Cush. 194), Shaw, C. J., said: "It has sometimes been made a question whether a riparian proprietor can divert water from a running stream for purposes of irrigation. But this, we think, is an abstract question which cannot be answered, either in the affirmative or negative, as a rule applicable to all cases. That a portion of the water of a stream may be used for the purpose of irrigating land, we think is well established as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor cannot, under color of that right, or for the actual purpose of irrigating his own land, wholly abstract or divert the water-course, or take such an unreasonable quantity of water, as to deprive other proprietors of the substantial benefits which they might derive from it, if not diverted or used unreasonably" (see *Arnold v. Foot*, 12 Wend. 330; *Blanchard v. Baker*, 8 Greenl. 253; *Evans v. Merriweather*, 4 Ill. 496; *Weston v. Alden*, 8 Mass. 136; *Colburn v. Richards*, 13 Id. 420; *Anthony v. Lapham*, 5 Pick. 175; *Randall v. Silverthorn*, 4 Penn. St. 173; *Wadsworth v. Tillotson*, 15 Conn. 366).

<sup>2</sup> Every proprietor is entitled to the use of the flow of the water in its natural course, and to the momentum of its fall on his own land. The owner has no property in the water. He may use it as it passes, but he cannot unreasonably detain it, and he cannot divert or diminish the quantity (*Van Hoesen v. Coventry*, 10 Barb. 518. And see Angell on Water-Courses, 6th Ed. § 90).

<sup>3</sup> *Embrey v. Owen*, 6 Exch. 370; *Chasemore v. Richards*, 2 Hurlst. & N. 168; 7 H. L. Cas. 349; *Mason v. Hill*, 5 Barn. & Ad. 1; *Honsee v. Hammond*, 39 Barb. 89; *Whittier v. Cocheco Manuf. Co.*, 9 N. H. 454; *Buddington v. Bradley*, 10 Conn. 213; *Johnson v. Lewis*, 13 Id. 303; *Blanchard v. Baker*, 8 Greenl. 253; *Corning v. Troy Iron & Nail Factory*, 34 Barb. 485; 22 How. Pr. 217; *Pixley v. Clark*, 32 Barb. 268; *Sacridier v. Beers*, 10 Johns. 241; *Livingston v. Adams*, 8 Cow. 175; *Platt v. Johnson*, 15 Johns. 213; *Merritt v. Brinckerhoff*, 17 Id. 306; *Arnold v. Foot*, 12 Wend. 330; *Twiss v. Baldwin*, 9 Conn. 291; *Howell v. McCoy*, 3 Rawle, 256; *Hoy v. Sterret*, 2 Watts, 327; *Davis v. Fuller*, 12 Verm. 178; *Norton v. Valentine*, 14 Id. 239; *Wadsworth v. Tillotson*, 15 Conn. 356; *Hendricks v. Johnson*, 6 Port [Ala.] 472; *Webster v. Fleming*, 2 Humph. 518; *Evans v. Merriweather*, 4 Ill. 492. See *Vandenburgh v. Bergen*, 13 Johns. 212.

grant or prescription so to use the same.<sup>1</sup> So he cannot legally increase the quantity of water which flows through or along his land to the injury of another land-owner on the stream.<sup>2</sup>

§ 574. The erection of dams and other hydraulic works in or near flowing streams necessarily causes the retardation and diminution of some part of the water, and consequently more or less injury to other similar works above and below on the same stream. The right of the owner of the bed or of the banks of an unnavigable stream to erect a dam across it cannot be questioned; and so long as he exercises, in its construction and maintenance, an ordinary and reasonable degree of care, he is not liable for the in-

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<sup>1</sup> The exclusive enjoyment of water in a particular way for twenty years or more, without interruption, is sufficient to raise a presumption of a grant to use it in that manner; and it is not necessary that the person claiming this prescriptive right should have used the waters exactly in the same way for the whole twenty years, providing the mode of using it has not been materially varied to the prejudice of the rights of others during that time (*Belknap v. Trimble*, 3 Paige, 577. See *Matter of Water Commissioners*, 4 Edw. Ch. 545; *Smith v. Adams*, 6 Paige, 435). But the mere occupation for a time not sufficient to raise the presumption of a grant, does not give an exclusive right to the use of the water (*Platt v. Johnson*, 15 Johns. 213). And the mere omission by one proprietor to make use of a right which belongs to him, however long continued, will not prejudice him or confer any right upon the adjoining proprietors (*Townsend v. McDonald*, 12 N. Y. 381; reversing S. C., 14 Barb. 460).

<sup>2</sup> *Merritt v. Parker*, Coxe, 460; see *Williams v. Gale*, 3 Harr. & J. 231. In general, the question of what is a reasonable use of the water of a running stream, is one for the jury to determine on the circumstances of each particular case (*Wheatley v. Baugh*, 25 Penn. St. 535; *Snow v. Parsons*, 28 Verm. 459; *Honsee v. Hammond*, 39 Barb. 89; *Hayes v. Waldron*, 44 N. H. 580). For illustrations of what will be deemed a reasonable or unreasonable use of the water, see *Thurber v. Martin*, 2 Gray, 394; *Hayes v. Waldron*, 44 N. H. 580; *Elliot v. Fitchburgh R. Co.*, 10 Cush. 191; *Gillett v. Johnson*, 30 Conn. 180; *Honsee v. Hammond*, 39 Barb. 89; *Tourtellot v. Phelps*, 4 Gray, 376; *Gould v. Boston Duck Co.*, 13 Id. 442. The quantity of water used in a very dry season when the stream is low, may be more unreasonable than the quantity used in a wet season, when the stream is high (see *Hetrich v. Deachler*, 6 Penn. St. 32; *Miller v. Miller*, 9 Id. 74; *Newhall v. Ireson*, 8 Cush. 595). In *Woods v. Edes* (2 Allen, 580), it was held that, to detain water by a dam for the purpose of a fish pond constantly maintained, and allowing the natural flow of the water to pass unimpeded to the plaintiff's mill, was a reasonable use of the water as it passed through the defendant's land (and see *Springfield v. Harris*, 4 Allen, 494).

direct and consequential damages caused by such erections, and incident to the common use of the water.<sup>1</sup> For such injuries, the law gives no redress. It is only for such injuries as are palpable, such as render the mill below useless or less productive,<sup>2</sup> that the law furnishes a remedy. If it is the only result of erecting a dam in proximity to one already built, that the proprietor of the latter is obliged to extend his dam further into the stream, or to carry produce a greater distance to his mill, these are not injuries for which he can recover, provided he still has sufficient water with which to work his mill.<sup>3</sup> But if the proprietor of a mill shuts down his gates and detains the water for an unreasonable time, or lets it out in such quantities as to prevent the owner of the mill below from using it, or deprives him of a reasonable and fair participation in the benefits of the stream, he will be liable in damages.<sup>4</sup>

§ 575. It is a necessary consequence of building a dam in a stream, that the water is raised above its natural surface. If the proprietor of the dam uses ordinary care to protect the embankments of the stream from breaking away under the pressure of the additional water thus detained, he is not liable for the consequences of the percolation of water through the natural soil, under the embankment, upon an adjacent owner's land.<sup>5</sup> But he has no

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<sup>1</sup> *Pixley v. Clark*, 32 Barb. 268; *Hartzall v. Sill*, 12 Penn. St. 248; see *Chandler v. Howland*, 7 Gray, 350; *Davis v. Winslow*, 51 Maine, 291; *Webb v. Portland Manufacturing Co.*, 3 Sumner, 189; *Shrewsbury v. Smith*, 12 Cush. 181; *Palmer v. Mulligan*, 3 Caines, 307; *Thompson v. Crocker*, 9 Pick. 59; *Weston v. Alden*, 8 Mass. 136.

<sup>2</sup> *Merritt v. Brinckerhoff*, 17 Johns. 306; *Johnson v. Lewis*, 13 Conn. 303; *Tyler v. Wilkinson*, 4 Mason, 401; *Wadsworth v. Tillotson*, 15 Conn. 366; see *Pitts v. Lancaster Mills*, 13 Metc. 156; *Brace v. Yale*, 10 Allen, 444.

<sup>3</sup> *Palmer v. Mulligan*, 3 Caines, 307; *Platt v. Johnson*, 15 Johns. 213; *Thompson v. Crocker*, 9 Pick. 59; and see *Boynton v. Rees*, Id. 528; *Hayes v. Waldron*, 44 N. H. 584; *Davis v. Getchell*, 50 Maine, 602; *Embrey v. Owen*, 7 Exch. 352.

<sup>4</sup> *Merritt v. Brinckerhoff*, 17 Johns. 306; *Hetrich v. Deachler*, 6 Penn. St. 32; *Pratt v. Lamson*, 2 Allen, 288; *Bliss v. Rice*, 17 Pick. 23.

<sup>5</sup> *Pixley v. Clark*, 32 Barb. 268.

right to build a dam of such a height as will necessarily cause the water to set back upon a mill higher up the stream, or to overflow the natural banks of the stream; and if he does so, he is liable,<sup>1</sup> without proof of special damage. The law will presume damage.<sup>2</sup> Though a person has a right to erect a mill where he pleases on his own land, yet, if he erects a dam so near an existing dam, that the dam before erected causes the water to flow back on his mill, and obstruct its movement, he cannot complain.<sup>3</sup>

§ 576. If a dam is not built upon a proper model or of good material, or is not braced sufficiently to withstand freshets of ordinary occurrence,<sup>4</sup> by reason of which it breaks away and causes injury to others, the owner is liable. No more, however, than ordinary care in its construction and maintenance is required. If, notwithstand-

<sup>1</sup> *Munroe v. Gates*, 48 Maine, 463; *Brown v. Bowen*, 30 N. Y. 519; *Great Falls Co. v. Worster*, 15 N. H. 460; *Odiorne v. Lyford*, 9 Id. 502; *Hazard v. Robinson*, 3 Mason, 272; *Hutchinson v. Granger*, 13 Verm. 386; *Johns v. Stevens*, 3 Id. 308; *Heath v. Williams*, 25 Maine, 209; *Stout v. McAdams*, 2 Scam. 67; *Stiles v. Hooker*, 7 Cow. 266; see *Baldwin v. Calkins*, 10 Wend. 167; *Dyer v. Depui*, 5 Whart. 584; *Cowles v. Kidder*, 24 N. H. 364; *Saunders v. Newman*, 1 Barn. & Ald. 258; *Russell v. Scott*, 9 Cow. 279. Where a dam is erected, and raises the stream so as materially to injure the mills or mill privileges above, a court of equity will interfere by injunction (*Hammond v. Fuller*, 1 Paige, 197; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Reid v. Gifford*, Hopk. 416; and see *Belknap v. Belknap*, 2 Johns. Ch. 463; *Van Bergen v. Van Bergen*, 3 Id. 282). When the deeds, under which the owners of opposite banks of a stream claimed, gave to each an equal right to the enjoyment of the water, and the owner of the mills on one side was proceeding to build so as to deprive the other thereof, an injunction was granted (*Case v. Haight*, 3 Wend. 632; reversing S. C., *sub. nom.* *Arthur v. Case*, 1 Paige, 447).

<sup>2</sup> *Woodman v. Tufts*, 9 N. H. 88. In an action for obstructing a water-course, the court ordered the jury to find the full value of the land overflowed in damages, under the circumstances of the case (*Anon.* 4 Dall. 147). In an action by the mortgagee of a mill privilege for flowing the water back so as to render it useless, the measure of damages is the interest of the value of the privilege, if unobstructed, from the time of taking possession (*Hatch v. Dwight*, 17 Mass. 289; see *Polly v. McCall*, 37 Ala. [N. S.] 20; *Read v. Barker*, 1 Vroom, 378).

<sup>3</sup> *Van Bergen v. Van Bergen*, 8 Johns. Ch. 282.

<sup>4</sup> It is not enough that the dam was sufficient to resist ordinary floods, if the stream was subject to great freshets. The latter likewise should have been guarded against (*Bailey v. Mayor &c. of New York*, 3 Hill, 531).



ing the exercise of such care in building, the water undermines its foundations, carrying away the whole structure and injuring dams or other property lower down the stream, the owner is not liable.<sup>1</sup> If a dam is so improperly constructed as to cause ice to accumulate, and on the ice breaking up in the spring, the fields adjoining the dam are injured, it is a nuisance, and the proprietor is liable in damages for special injuries caused by such accumulations of ice.<sup>2</sup> It is the duty of the proprietor to keep the waste gates free for the passage of water; and it is no excuse for suffering the gates to become choked with refuse, setting back the water, that this would not have happened but for deposits of dirt improperly made by others in and near the upper part of the stream.<sup>3</sup>

§ 577. It is a general principle that any person who, without authority, diverts the whole or any part<sup>4</sup> of the water of a stream from its natural course, or interferes with its natural current, is responsible absolutely, and without any question of negligence, to any one who is entitled to have the water flow in its natural state.<sup>5</sup> It is

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<sup>1</sup> *Livingston v. Adams*, 8 Cow. 175; *Pixley v. Clark*, 32 Barb. 268; *Everett v. Hydraulic &c. Co.*, 23 Cal. 225.

<sup>2</sup> *Bell v. McClinton*, 9 Watts, 119; see *Cowles v. Kidder*, 24 N. H. 364; but see *Smith v. Agawam Canal Co.*, 2 Allen, 355.

<sup>3</sup> *Schuylkill Navigation Co. v. McDonough*, 33 Penn. St. 73.

<sup>4</sup> A person through whose farm a stream naturally flows, is entitled to have the whole pass through it, though he may not require the whole or any part of it for the use of machinery (*Crooker v. Bragg*, 10 Wend. 260; see *Webb v. Portland Manufacturing Co.*, 3 Sumner, 189).

<sup>5</sup> *Bellinger v. N. Y. Central R. Co.*, 23 N. Y. 42; *Parker v. Griswold*, 17 Conn. 299; *Pratt v. Lamson*, 2 Allen, 275. But one who has an authority, constitutionally granted by the legislature, to interfere with a running stream of water, is liable for the consequences of the negligent manner of such interference only, and not absolutely (*Bellinger v. N. Y. Central R. Co.*, 23 N. Y. 42; *Blood v. Nashua & Lowell R. Co.*, 2 Gray, 137; see *White v. South Shore R. Co.*, 6 Cush. 412; *Hooker v. New Haven & Northampton Co.*, 15 Conn. 312; *Denslow v. The Same*, 16 Id. 98; and see *ante*, § 363). An artificial rivulet created by the drainage and pumping of a colliery may be diverted before it flows into the natural stream, and the proprietor on the banks of the natural stream will have no right of action for the diversion of that water (*Wood v. Waud*, 3 Exch. 779).

no excuse for such diversion, that the stream, notwithstanding its diversion, might still be made valuable for water power,<sup>1</sup> or that the other riparian owners would not have been damaged if they had continued to use the water as they formerly had done,<sup>2</sup> or that there was still water enough left to supply the mills lower down on the stream.<sup>3</sup> A person cannot justify a wrongful act on the ground that the consequences of it were not as injurious as they might have been. The rule is that no special damages need be alleged or proved to maintain an action for the unlawful diversion of a water-course.<sup>4</sup>

§ 578. Any use of the land near a stream, or of the water of the stream itself, which renders the water unwholesome, offensive, or unfit for the purposes for which it is used, is unlawful, and any riparian owner who is damaged by such unlawful acts has an action for his damages against the author of the wrong. Thus, one who sinks a cess-pool in the ground,<sup>5</sup> or deposits manure or other noxious substances<sup>6</sup> so near the water as to corrupt it, is

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<sup>1</sup> *Plumleigh v. Dawson*, 1 Gilm. 544.

<sup>2</sup> *King v. Tiffany*, 9 Conn. 162.

<sup>3</sup> *Crooker v. Bragg*, 10 Wend. 260.

<sup>4</sup> *Butman v. Hussey*, 12 Maine, 407; *Plumleigh v. Dawson*, 1 Gilm. 544; *Stein v. Burden*, 24 Ala. [N. S.] 130; *Hendrick v. Cook*, 4 Geo. 241; see *Mason v. Hill*, 3 Barn. & Ad. 304; 5 Id. 1; *Blanchard v. Baker*, 8 Greenl. 253.

<sup>5</sup> *Call v. Buttrick*, 4 Cush. 345; *Norton v. Scofield*, 9 Mees. & W. 665.

<sup>6</sup> *Woodward v. Aborn*, 35 Maine, 271; *Brown v. Illius*, 27 Conn. 84. It has been held illegal to erect a tanyard upon a stream if its effect is to render the water unwholesome (*Howell v. McCoy*, 3 Rawle, 356. And see *Crossley v. Lightowler*, Law Rep. 3 Eq. 279). It is clearly illegal for the owner of a tannery to throw tan-bark into a stream so as to foul the water or otherwise damage the proprietors lower down the stream (*Honsee v. Hammond*, 39 Barb. 89). The appropriator of a stream for mining purposes must use it so as not to injure orchards and gardens along the stream, which were inclosed and planted before the water was appropriated (*Wixon v. Bear River &c. Co.*, 24 Cal. 367). Nothing but a user for a sufficient time, will justify the turning of water impregnated with metallic substances or dye stuffs into a water-course (*Wright v. Williams*, 1 Mees. & W. 77; see *Crossley v. Lightowler*, Law Rep. 3 Eq. 279; Law Rep. 2 Ch. App. 478). But the right may be acquired by adverse user for twenty years (*Merrifield v. Lombard*, 13 Allen, 16; *Jones v. Crow*,

liable to any one who has a right to have the water flow in its natural state of purity. It makes no difference whether the noxious substances are carried upon the surface of the ground, or have soaked into the soil and are carried along under the surface by means of water diffusing itself according to natural laws.<sup>1</sup> But it has been held, in an action for corrupting the water of a well, that where such noxious substances, by penetrating or being buried in the soil, affected subterraneous currents by which the well was supplied, and corrupted the water only in that mode, the party placing such substances on or within his soil was not liable, in the absence of malice.<sup>2</sup>

§ 579. Although sewers, drains, or other artificial means of carrying off water, are not strictly within the legal definition of water-courses, they are usually mentioned in connection with that subject. We have referred in a previous section<sup>3</sup> to the liability of a municipal corporation for the non-repair of public sewers, to the owners of lands drained thereby. Although the question is not altogether free from doubt, we think the rule may be stated to be that a municipal corporation undertaking the construction and maintenance of a culvert, drain, or sewer, is liable to the owners of lands intended to be drained thereby for any injuries they may sustain by reason of the omission of the corporation to use ordinary and reasonable care and skill in the

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32 Penn. St. 398; *Hayes v. Waldron*, 44 N. H. 585; *Murgatroyd v. Robinson*, 7 El. & Bl. 391). For other illustrations of the rule, see *Moore v. Webb*, 1 C. B. [N. S.] 673; *Carlyon v. Lovering*, 1 Hurlst. & N. 784. See *Magor v. Chadwick*, 11 Ad. & El. 571; *Rawstron v. Taylor*, 11 Exch. 380; *Baxendale v. McMurray*, Law Rep. 2 Ch. App. 790; *Stockport Waterworks v. Potter*, 7 Hurlst. & N. 160; *Stonehewer v. Farrar*, 6 Q. B. 730; *Hodgkinson v. Ennor*, 4 Best & S. 229; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Ch. 335; *Snow v. Parsons*, 28 Verm. 459; *Wheatley v. Chrisman*, 24 Penn. St. 298; *Lewis v. Stein*, 16 Ala. [N. S.] 214.

<sup>1</sup> *Brown v. Illius*, 27 Conn. 84.

<sup>2</sup> *Brown v. Illius*, 27 Conn. 84.

<sup>3</sup> See §§ 144, 151.

construction and subsequent maintenance of the structure. If it is constructed of such an insufficient capacity,<sup>1</sup> or is negligently premitted to become choked with refuse,<sup>2</sup> so as to prevent the free passage and discharge of the waters, and to cause them to set back upon the adjacent premises, the corporation is liable for the damages which may be sustained.

§ 580. Every owner of land has a right to carry off the surface water from his land in any manner he may see fit, either by sewage, or by filling up the wet and marshy places on his own soil. If by the exercise of such right, an adjacent owner is damaged, it is *damnum absque injuria*.<sup>3</sup> On the other hand, any interference with, or obstruction of, a private drain, is unlawful, and subjects the wrong-doer to an action for any damages which may be thereby sustained. Thus in a case where a ditch drained the lands of two proprietors respectively, and the lower owner, by building a dam, set the water back upon the upper land,

<sup>1</sup> Rochester Whitelead Co. v. Rochester, 3 N. Y. 463; Brown v. Sargent, 1 Post. & F. 112. Compare Mills v. Brooklyn, 32 Id. 489.

<sup>2</sup> Child v. Boston, 4 Allen, 41; Barton v. Syracuse, 37 Barb. 292; Wallace v. Muscatine, 4 Greene, 373; see *ante*, § 157. In England, the ownership of all public sewers is vested in certain commissioners, and in a case where an ancient, open, and unfenced sewer, which ran beside a public highway, came under the control of such commissioners, it was held that it was not the duty of the commissioners to fence the sewer, and that they were therefore not liable for an accident which happened from the want of a fence (Cornwell v. Metropolitan Comm'rs, 10 Exch. 771). In a recent English case, it was held that a contractor employed to open a public road for the purpose of constructing a sewer is not liable, after filling in the trench and making that part of the road as sound and compact as it can then be made, for the consequences of the natural subsidence of the soil which he put in (Hyams v. Webster, Law Rep. 2 Q. B. 264).

<sup>3</sup> Goodale v. Tuttle, 29 N. Y. 459; Wheeler v. Worcester, 10 Allen, 591; Gannon v. Hargadon, 10 Id. 106; Parks v. Newburyport, 10 Gray, 28; Luther v. Winnisimmet Co., 9 Cush. 171; Dickinson v. Worcester, 7 Allen, 19; Buffum v. Harris, 5 R. I. 253; White v. Chapin, 12 Allen, 516; Rawstron v. Taylor, 11 Exch. 369; Ellis v. Duncan, 21 Barb. 230; affirmed, Ct. of Appeals, 1864; Greenleaf v. Francis, 18 Pick. 117; Johnson v. Jordan, 2 Metc. 234; Delhi v. Youmans, 50 Barb. 316.

destroying the crops thereon, he was held liable in damages.<sup>1</sup>

§ 581. No one is liable for the action of water with which he has in no way interfered. Whether it runs in a stream, or settles in a bog, whether it has always taken the same course, or has changed it, is of no importance, so long as the owner or occupant of the land has not, directly or indirectly, altered its natural flow.<sup>2</sup> On the other hand, one who wrongfully removes a barrier to the flow of water from his land upon his neighbor's, cannot escape liability for the consequences by any degree of subsequent care.<sup>3</sup> For in taking away the barriers provided by nature, he becomes absolutely responsible for the action of the water—as much so as if it were a living creature which he had ordered to do what it does; and his best efforts to stay the progress of the evil will not in the least excuse him for having originally set it in motion, any more than a wound inflicted upon the person of another would be excused by the best exertions of the guilty party to heal it.

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<sup>1</sup> *Shaw v. Etheridge*, 7 Jones [N. C.] Law, 225. See *Williams v. Gale*, 3 Harr. & J. 231.

<sup>2</sup> See *Thomas v. Kenyon*, 1 Daly, 132, per Daly, J.

<sup>3</sup> Where the defendant had wrongfully removed a natural barrier to the flow of water from his land upon the plaintiff's land, he was held bound to make another barrier equally adequate for the purpose, and liable, in default thereof, for all the damage done by such overflow (*Firmstone v. Wheeley*, 13 Law Jour. [Exch.] 361; 2 Dowl. & L. 203). The defendants were owners of a mine adjoining that of the plaintiffs, and removed water from one portion of their mine to another, knowing that the water in consequence would percolate (as it did) into the plaintiff's mine. If the water had not been removed by the defendants, it would not have entered the plaintiff's mine. Held, that as the course which the water took was owing to the active interference of the defendants, they were responsible (*Baird v. Williamson*, 15 C. B. [N. S.] 376. See *Bagnall v. London & Northwestern R. Co.*, 1 Hurlst. & C. 544; affirming, 7 Hurlst. & N. 423). Where the defendant, in an action for flooding land, sought to prove that adjoining ground had suffered the same injury as the plaintiff's from natural causes, it was held that such evidence could be received in connection with proof that, by similarity of position, or otherwise, the plaintiff's land might probably have been injured from the same cause (*Standish v. Washburn*, 21 Pick. 237).

§ 582. Navigable streams are public highways, in the sense that every person has a right to travel upon them.<sup>1</sup> Any interference with, or obstruction of, a navigable stream, which is calculated to impede travel upon it, is a public nuisance, punishable by public prosecution. Thus, it is a public nuisance to build a bridge<sup>2</sup> or a dam<sup>3</sup> upon a navigable stream without legislative authority; and although built under such an authority, it will still be a nuisance, if it is not built so as to do as little injury as possible to the navigation.<sup>4</sup>

§ 583. Some nice questions have arisen as to the obligation of a navigator of public waters, whose vessel has been sunk, to remove the wreck altogether or to protect it so as to prevent accidents to other vessels. It is well settled that the owner of a vessel which has been sunk in navigable waters, and abandoned by him, is under no obligation to remove the vessel,<sup>5</sup> and is not liable for the injuries it may cause other navigators. If, however, instead of abandoning the wreck, he retains such possession and control of it as it is susceptible of, he is bound to exercise an ordinary and reasonable degree of diligence and dispatch either in removing it, or in preventing its doing in-

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<sup>1</sup> See *ante*, § 343, and cases cited.

<sup>2</sup> See *ante*, § 249, and cases cited.

<sup>3</sup> The law of the erection of a dam is, that it shall not obstruct or impede the navigation of the stream (*Hall v. Lacey*, 3 Grant [Penn.] 264). An act authorizing a corporation to build a dam on their own land upon and across a river which is a highway, merely protects them from indictment for a nuisance in obstructing the river; but if, in building their dam, they overflow the land of others, the act does not protect them from liability for such flowage (*Eastman v. Amoskeag & Co.*, 44 N. H. 143).

<sup>4</sup> *Dugan v. Bridge Company*, 27 Penn. St. 303; *Monongahela Bridge Co. v. Kirk*, 46 Id. 112; *Manley v. St. Helen's Canal Co.*, 2 Hurlst. & N. 840; *Lansing v. Smith*, 8 Cow. 146; 4 Wend. 3; *Ely v. Rochester*, 26 Barb. 133; *White v. Yazoo*, 27 Miss. 357; see *Sprague v. Worcester*, 13 Gray, 193; *West River Bridge Co. v. Dix*, 6 How. [U. S.] 545; *Varick v. Smith*, 5 Paige, 137; 9 Id. 547; *Wetmore v. Story*, 22 Barb. 414.

<sup>5</sup> *Rex v. Watts*, 2 Esp. 675.

jury to others. He is as much bound to use care in the control of his vessel while it is under water as while it is above water.<sup>1</sup> If he undertakes to remove the wreck, he is bound only to use reasonable means and expedition to accomplish that result, and the mere fact that the means employed were found inadequate, is not of itself proof of negligence.<sup>2</sup>

§ 584. The rules of navigation, and the numerous cases involving negligence in the management of vessels, have come to form of themselves a body of law, requiring for its satisfactory treatment a large acquaintance with technical terms and an application of principles which belong to a system of jurisprudence not entirely in harmony with the common law. A statement of these rules would hardly be looked for as a necessary part of this treatise, even if our knowledge or space would permit it.

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<sup>1</sup> *Brown v. Mallett*, 5 C. B. 599; *Hancock v. York, Newcastle & B. R. Co.*, 10 C. B. 348; *White v. Crisp*, 10 Exch. 312; 26 Eng. Law & Eq. 532; *Taylor v. Atlantic Mutual Ins. Co.*, 37 N. Y. 275; affirming S. C., 9 Bosw. 369.

<sup>2</sup> *Taylor v. Atlantic Mutual Ins. Co.*, 9 Bosw. 369; S. C. affirmed, 37 N. Y. 275. See the same case on demurrer to complaint, 2 Bosw. 106. In that case a vessel, alongside of a public pier in the city of New York, was burned without any fault of her owner, and sunk to the bottom near the mouth of the slip or basin, thereby obstructing the slip and bulkhead so as to prevent other vessels from coming in, and the defendants, insurance companies which had insured undivided interests in the vessel, and had accepted an abandonment made by such insured owner, after the loss, employed a man of acknowledged skill and ability in the business of wrecking, who diligently prosecuted his efforts to raise it, until his method failed, and he left the work, when the defendants employed another man of equal skill and ability, who adopted another plan, and continued diligently working until stopped by cold weather, nearly a year after the vessel sunk, and in the following spring resumed the work, but was soon stopped, when very near completing it, by the city authorities, who took exclusive possession and control, and who finally removed the wreck. Held, 1st, that the defendants were not liable to the owners of the pier for its use in the prosecution of their work, or for damages in obstructing the basin meanwhile, since these facts did not show any negligence on their part; 2d, that the defendants were not liable for any delays occurring after the city authorities took possession and control. And see *Hammond v. Pearson*, 1 Campb. 515.

## CHAPTER XXXII.

### MISCELLANEOUS CASES OF NEGLIGENCE.\*

- SEC. 585. Liability of wharf-owners.  
586. To whom wharf-owner is liable.  
587. Negligence in use of fire-arms.  
588. Custom no excuse for reckless use of fire-works.  
589. Negligence of traveler over a private way.  
590. Management of machinery.  
591. Statutory obligation to fence machinery.  
592. Dealers in poisons.  
593. Owners of dangerous materials.

§ 585. The owner or lessee of a dock, pier, or wharf, receiving tolls for its use, is bound to keep it in reasonably good condition, so that, as far as by the use of ordinary care, diligence, and skill he can make it so, it shall be fit for the use of vessels, and safe for all persons to enter upon, who have a right of access. If the wharf-owner receives tolls from the public generally, he owes this duty to the public, and is liable to any one specially injured by his neglect to fulfill it;<sup>1</sup> but if he throws the wharf open to the use of the public without charge, he is only liable for such defects as amount to a public nuisance. It is culpable negligence to permit any thing to project from

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\* The following cases may be referred to in special instances, but are not worth classification, except so far as they have been already used in previous chapters. Blasting (*Driscoll v. Newark Lime &c. Co.*, 37 N. Y. 637; and see chapter on REAL PROPERTY). Sunken boat (*McGrew v. Stone*, 53 Penn. St. 436). Poisoning land by copper manufacturing company (*Lincoln v. Taunton &c. Mfg. Co.*, 9 Allen, 181). Upsetting a stove and spilling hot water (*Sullivan v. Murphy*, 2 Miles, 298).

<sup>1</sup> *Pittsburgh v. Grier*, 22 Penn. St. 54; *Radway v. Briggs*, 37 N. Y. 255; 4 Trans. App. 98; *Taylor v. Mayor &c. of N. Y.*, 4 E. D. Smith, 559; *Buckbee v. Brown*, 21 Wend. 110; *Wendell v. Baxter*, 12 Gray, 494; *White v. Phillips*, 15 C. B. [N. S.] 245; *Cannavan v. Conklin*, 1 Dana, 509; *Mersey Docks v. Gibbs*, Law Rep. 1 H. L. 93; affirming *Gibbs v. Liverpool Docks*, 3 Hurlst. & N. 164; and *Mersey Docks v. Penhallow*, 7 Id. 329.



the side of a wharf, in such a manner as, by any probable combination of circumstances, to endanger the safety of vessels moored to the wharf. They are entitled to the unobstructed use of the water, whether it rises or falls.<sup>1</sup> A wharf or dock-owner, receiving toll, does not fulfill his obligations by simply keeping the wharf or dock clear of obstacles and defects which are visible upon an external inspection. If the general experience of persons in charge of wharves and docks has made it a fact of common notoriety among them, that such property is liable to become defective and dangerous from causes that cannot be detected from a mere external inspection, the owner is bound to make such further examination as is usual among owners of like property, having interests of their own to protect from damage, of equal magnitude with those of the community in general, which are exposed to danger in the particular case.<sup>2</sup> A dock ought to be dredged and cleaned with sufficient frequency to enable all such vessels as are accustomed to enter it to do so

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<sup>1</sup> A. was possessed of a wharf, and had a mast projecting therefrom over the river. B. moored a vessel at the adjoining wharf, with her bowsprit overhanging the front of A.'s wharf, and, on the falling of the tide, the bowsprit of B.'s vessel coming in contact with A.'s mast, broke it. Held, that B. was not responsible (*Dalton v. Denton*, 1 C. B. [N. S.] 672).

<sup>2</sup> This appears to us to be the proper rule, although the precise question has not been determined. In an action against the proprietors of a wharf for injuries occasioned by a defect therein to a person upon it, in the employment of a third party to whom the wharf was let, the jury were instructed, that, if the defendants had established the wharf for the use of the public for a reasonable compensation, they were bound to keep it safe for such use; and if the plaintiff, when properly on the wharf, in the exercise of reasonable care and diligence, sustained injury through a defect in the wharf, he was entitled to recover, unless the defect was so hidden and concealed that it could not be discovered by such examination and inspection as the construction, use, and exposure of the wharf reasonably required; and if the defendants knew that causes rendering the wharf insecure were constantly or occasionally in operation, which they could by the exercise of ordinary diligence and care provide against, they ought to do so. Held, that the defendants had no ground of exception (*Wendell v. Baxter*, 12 Gray, 494). But it may well be that the court considered the charge to be too favorable to the defendants.

without stranding or dragging.<sup>1</sup> And if for any reason the owner of the dock cannot do this, or claims to be released from the obligation to do so, he must withdraw all express or implied invitation for the entry of vessels; and, if they are accustomed to enter, paying toll, he must close the dock, or in some other way distinctly warn them to keep out of it.<sup>2</sup> The existence of piles or other obstructions under the water, and projecting above the ground at the bottom, is presumptive evidence of negligence; and it is not a sufficient excuse to show that the owner, at the time of an injury thus caused, did not place the obstructions there, or even know of their existence. He should have tested the safety of the dock.<sup>3</sup> But the owner of the dock does not insure vessels against injury in it; and if he has taken all the care that can reasonably be expected of him, he is not liable for damage done to a vessel by an obstruction in the dock.<sup>4</sup> The master of a

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<sup>1</sup> *Buckbee v. Brown*, 21 Wend. 110; see *Mersey Docks Trustees v. Gibbs*, L w Rep. 1 H. L. 93; affirming *Gibbs v. Trustees of Liverpool Docks*, 3 Hurlst. & N. 164; reversing S. C., 1 Id. 493; see also *Lancaster Canal Co. v. Parnaby*, 11 Ad. & El. 223.

<sup>2</sup> *Mersey Docks v. Gibbs*, *supra*.

<sup>3</sup> Mere ignorance of the defect is not a good defense (*Mersey Docks v. Gibbs*, *supra*; *White v. Phillips*, 15 C. B. [N. S.] 245). A previous owner had excavated the land below water, in front of the wharf, and had supported the ground beyond by piles. The earth had gradually washed away, leaving the piles bare. Held, that the existing owner was liable for an injury caused to a vessel by these piles (*White v. Phillips*, 15 C. B. [N. S.] 245). The defendant contracted with the Lords of the Admiralty for the erection of docks and works in Plymouth Harbor, and for that purpose sunk piles in the navigable part of the channel. After the completion of the works, and after a reasonable time for the removal of the piles, the defendant sold the piles to A., who undertook to remove them by a certain date, or sooner, if required by the Lords of the Admiralty. The Admiralty subsequently required A. not to draw the piles, and he, acting under those orders, cut the piles off on a level with the bed of the channel. The soil was subsequently washed from around the stumps, and the plaintiff's vessel struck against them and was injured. In the position in which the piles existed at the time the defendant delivered them up to A., the damage could not have been done without the plaintiff's gross negligence. Held, that there was no cause of action against the defendant (*Bartlett v. Baker*, 3 Hurlst. & C. 153).

<sup>4</sup> See *Exchange Fire Ins. Co. v. Delaware & Hudson Canal Co.*, 10 Bosw. 180.

vessel has a right to presume that all parts of a dock are safe, and is not guilty of contributory negligence by taking a place which might, under circumstances not anticipated by him, be less safe than another.<sup>1</sup> And even his knowledge of a defect in the dock, such, for example, as a bar of earth across the entrance, does not necessarily make it negligent for him to use the dock. He may rely upon the act of the dock-owners in opening it, as evidence that the defect is not really dangerous.<sup>2</sup>

§ 586. The owner of a wharf is not only liable to those whom he invites thereon for his negligence, but is also liable for injuries thereby caused to persons invited by any one occupying a portion of the premises under an arrangement beneficial to such owner. It is not necessary that the person giving the invitation should himself pay toll : it is enough if he has a right to be there, and to invite others there, by virtue of his relations with one paying or liable to pay toll.<sup>3</sup>

§ 587. The common use of fire-arms by people of all classes and ages, which is characteristic of this country, has of course led to the infliction of a vast number of injuries from negligence in their use ; but for various reasons, the number of litigated cases arising out of such injuries have been comparatively few, and the number of

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<sup>1</sup> *Pittsburgh v. Grier*, 22 Penn. St. 54.

<sup>2</sup> *Thompson v. Northeastern R. Co.*, 31 L. J. [Q. B.] 194 ; 10 Weekly Rep. 404.

<sup>3</sup> The defendants, a dock company, provided gangways from the shore to the ships lying in their dock, the gangways being made of materials belonging to the defendants and managed by their servants. The plaintiff went on board a ship in the dock at the invitation of one of the ship's officers, and, while he was on board, the defendants' servants, for the purpose of the business of the dock, moved the gangway, so that it was, to their knowledge, insecure. The plaintiff, in ignorance of its insecurity, returned along it to the shore ; the gangway gave way, and he was injured. Held, that there was a duty on the defendants toward the plaintiff to keep the gangway reasonably safe, and that he was entitled to recover damages from them for the injuries he received (*Smith v. London & St. Katharine's Dock Co.*, Law Rep. 3 C. P. 326).

cases presenting any question of law which could make them worthy of report are still fewer. A very high degree of care is required from all persons using fire-arms in the immediate vicinity of other people, no matter how lawful, or even necessary, such use may be. Thus, where a military officer was training his men in the use of musketry, at the time and place prescribed by the orders of his superior officer, and in a mode sanctioned by law, he was nevertheless held responsible for injuries inflicted upon one of a crowd of spectators into whose faces he ordered his men to fire, supposing the muskets to be loaded with blank cartridge, whereas one or more were loaded with ball: the jury finding that he had not used sufficient care, although he stood himself in front of the soldiers while they fired.<sup>1</sup> Not only does the infliction of a wound upon the person,<sup>2</sup> or a breach in the property of another, constitute an actionable injury; but an action will also lie for injury suffered from the fright naturally caused by the discharge of a gun under circumstances making it improper to fire it.<sup>3</sup>

§ 588. The discharge of fire-works of every kind, in all kinds of places, and with a total disregard of comfort, convenience, and safety of every one not engaged in the

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<sup>1</sup> *Castle v. Duryea*, 42 Barb. 480; affirmed in Court of Appeals, 2 Keyes, 169.

<sup>2</sup> Trespass lies against the master of a steamboat for the injury done to the person of another by the discharge of a gun on board, by his command and in his presence, though the injury resulted from a want of due care merely (*Rhodes v. Roberts*, 1 Stew. [Ala.] 145). Case, not trespass, was held to be the proper action against one who discharged a musket at a vessel, and wounded the master, whereby the intended voyage was defeated, and the owners of the vessel subjected to loss (*Adams v. Hemmenway*, 1 Mass. 145).

<sup>3</sup> If one carelessly discharges a gun, by which a horse is frightened, to the injury of its owner, case lies if the defendant had no intention, nor reasonable ground of apprehension, of causing the fright. If he had such an intention, trespass would be the proper action (*Cole v. Fisher*, 11 Mass. 137). So an action lies for frightening a horse by beating a drum on or near the highway (*Loubz v. Hafner*, 1 Dev. [N. C.] Law, 185).

same patriotic work, is a well-known feature of our great national anniversary. If custom could sanction any thing inherently unreasonable and reckless, such sanction might be well claimed for this practice, which is now verging upon a century in age, during all which time the precedent has been honored by a strict observance. But the law, preferring common sense to precedent, does not admit of any excuse for such conduct upon this ground; and every one who indulges himself, even on the Fourth of July, in the discharge of fire-works in a highway, or in any place to which he has not a private right, is liable for any injury thereby caused to another.<sup>1</sup> Nor is it contributory negligence on the part of the injured person to walk or ride upon a highway at the very time that fire-works are exploding in it.<sup>2</sup> And one who lights a squib or other fire-work, and throws it where it causes danger to another, is liable to any one ultimately injured by its explosion, though it be thrown from one person to another for any number of times.<sup>3</sup>

§ 589. One who is permitted to pass over a private way for his own convenience, ought to close the gates behind him, and to replace any bars that he may take down, so as to leave the premises as well secured as he found them.<sup>4</sup> So one who is permitted to enter into another's house ought to shut the door after him, if he found it shut. And for the omission of these duties he will be liable in damages, if any accrue. It need hardly be said, however, that the owner of the premises must remedy the omission himself, as soon as he discovers it, and cannot recover for

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<sup>1</sup> Conklin v. Thompson, 29 Barb. 218.

<sup>2</sup> See *Ib.*

<sup>3</sup> Scott v. Shepherd, 2 W. Blacks. 892; 3 Wils. 403.

<sup>4</sup> One passing over a road obstructed by movable bars does not become a trespasser *ab initio* by his neglect to replace the bars, but is liable in case for the injury arising from such neglect (*Hinks v. Hinks*, 46 Maine, 423).

damage accruing after it was in his power to close the way.

§ 590. It is the duty of every one owning or using machinery, which is or may become dangerous, to take such precautions as reasonable care would suggest to prevent it from injuring persons who are rightfully in its vicinity. If for this purpose it is necessary to surround any part of such machinery with a fence, that must be done;<sup>1</sup> and where machinery cannot be in that or any similar way prevented from doing injury, it must, while in motion, be watched by some person capable of warning others of their danger. But where a machine is not in motion, and can do no injury while quiescent, its owner is not liable for damage done thereby to one who wantonly sets it in motion; and this, even though the machine be left unwatched in a public place.<sup>2</sup> And where dangerous machinery is in operation in full view, one who has a mere license to pass over the premises must choose a path (if there is one) quite out of the range of such machinery, even though it be not so convenient as the more dangerous path; and he cannot recover for an injury which he might thus have avoided, for he has no right to require a fence to be put around the machinery for his benefit. Nor, if a fence is put up, can he complain of its insufficiency, unless its defects were of a nature that did and well might mislead him into thinking it safe.<sup>3</sup> Persons who are invited to use a machine have a right to recover from the person giving the invitation for any injury that they suffer in consequence of its unfitness for the work, or of its imperfect construction, if the latter person was aware of the danger to which any one so using the machine was exposed, or if

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<sup>1</sup> See *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548.

<sup>2</sup> *Mangan v. Atterton*, Law Rep. 1 Exch. 239; 4 Hurlst. & C. 388.

<sup>3</sup> *Bolch v. Smith*, 7 Hurlst. & N. 736.

he was culpably negligent in constructing it. Thus, where a washing machine, originally made to be worked by hand, was worked by steam, and a rod was left in it, projecting dangerously above the level, which had been necessary to the working of the machine by hand, but was entirely useless for any other purpose, and by this the plaintiff was injured, the defendant was held guilty of culpable negligence in the construction of the machine.<sup>1</sup> If steam or any other explosive force is used to propel machinery, the person using it is liable to every one injured in person or property by an explosion occurring through want of ordinary care in the management of the boiler,<sup>2</sup> or any other part of the machinery.

§ 591. In England, mill-owners are required by statute to fence all their mill-gearing, and certain other parts of their machinery, while in motion for manufacturing purposes.<sup>3</sup> Although this statute purports to be for the protection of "children and young persons," yet its language, in respect to this particular duty, is sufficiently broad to entitle all persons employed in mills to its benefits.<sup>4</sup> And although the statute imposes a penalty for the violation of its provisions, yet this is not the only remedy left to an injured party. The omission to have a fence where it is required is an act of negligence, for which damages may be recovered, irrespective of the penalty.<sup>5</sup> The requirement of the statute being absolute, it is no defense to show that fencing would not have lessened the danger of the particular machinery in question.<sup>6</sup> But it is essential, in an action upon alleged negligence in this respect, that it

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<sup>1</sup> Cowley v. Sunderland, 6 Hurlst. & N. 565.

<sup>2</sup> Spencer v. Campbell, 9 Watts & S. 32.

<sup>3</sup> Stat. 7 & 8 Vict. c. 15, § 21.

<sup>4</sup> Coe v. Platt, 6 Exch. 752.

<sup>5</sup> Caswell v. Worth, 5 El. & Bl. 849, per Coleridge and Crompton, JJ.

<sup>6</sup> Doel v. Sheppard, 5 El. & Bl. 856.

should appear that the machinery was used for manufacturing purposes at the time of the injury. If it was in use for any other purpose, the absence of a fence is no ground of complaint under the statute,<sup>1</sup> whatever it may be at common law. And the statute does not exclude the defense of contributory negligence. One who, knowing that the machinery is unfenced, carelessly gets in its way, cannot recover for his injury.<sup>2</sup>

§ 592. All persons who deal with deadly poisons are held to a strict accountability for their use. The highest degree of care known among practical men must be used to prevent injury from the use of such poisons. And one who sells poison, labeled (by his culpable negligence) as an innocent drug, is liable to any person injured thereby, no matter through how many hands it may have passed.<sup>3</sup> A druggist is undoubtedly held to a special degree of responsibility for the erroneous use of poisons, corresponding with his superior knowledge of the business; and in Kentucky it has been held that he is absolutely liable, notwithstanding any degree of care that he may have used, for his mixture of poisons with ordinary drugs;<sup>4</sup> but this is a rule that does not generally prevail. The same principle applies to highly explosive materials, such as gunpowder, nitro-glycerine, and the like. And one who sells such things to a child, of such extreme youth as to be

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<sup>1</sup> *Coe v. Platt*, 6 Exch. 752; 7 Id. 460.

<sup>2</sup> *Caswell v. Worth*, 5 El. & Bl. 849; *Doel v. Sheppard*, Id. 856. Coleridge, J., said: "The statute makes the omission of a certain act illegal, and subjects the parties omitting it to penalties. But there can be no doubt that a party receiving bodily injury through such omission has the right of suing at common law. The action, however, must be subject to the rules of common law; and one of those is that a want of ordinary care, or willful misconduct, on the part of the plaintiff, is an answer to the action" (*Caswell v. Worth*, *supra*).

<sup>3</sup> *Thomas v. Winchester*, 6 N. Y. 397.

<sup>4</sup> *Fleet v. Hollenkemp*, 13 B. Monr. 219.



unfit to use them, is liable in an action by the child, for injuries suffered by it.<sup>1</sup>

§ 593. One who puts in the charge of another, as carrier, depositary, or otherwise, any thing which he knows to be of a dangerous nature, liable to injure other goods by explosion, corrosion, combustion, leakage, or the like, is bound to give the person with whom such things are deposited reasonable notice of the danger; and if he fails to do so, he is liable for all damage that may be done thereby to the persons or property of others, coming without their fault into dangerous contact with the thing, while its nature remains unknown to the persons having it in charge. Thus, where a substance was shipped under the name of bleaching powder, which was in fact mainly chloride of lime, the shipper was held liable for damage done to other goods on board by the fumes of the powder.<sup>2</sup> So where the defendant gave a carrier's servant a carboy of nitric acid, marked "acid," only, and the servant was injured by the explosion of the acid, it was held that the defendant was liable for the injury.<sup>3</sup> If the thing is an ordinary article of merchandise, the qualities of which are generally known, such as gunpowder, gun-cotton, nitric acid, nitro-glycerine, &c., a simple disclosure of the name of the article is sufficient notice of its nature; but if the thing is new in the market, or if its dangerous qualities are not common to its species, further warning is necessary. Thus, while in shipping a tiger no warning could be required, the viciousness of a horse, disposed to kick or bite, ought to be clearly stated to the carrier. It is not necessary, in order to maintain an action on this ground,

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<sup>1</sup> *Carter v. Towne*, 98 Mass. 567. And the fact that the defendant was duly licensed to sell gunpowder is no defense (Ib.)

<sup>2</sup> *Brass v. Maitland*, 6 El. & B. 470.

<sup>3</sup> *Farrant v. Barnes*, 11 C. B. [N. S.] 553.

to show that the person so delivering the property made any false representation, or intended any fraud;<sup>1</sup> but it must be shown that he knew the dangerous nature of the thing,<sup>2</sup> and that the person receiving it neither knew it, nor was put upon inquiry with the means of knowledge.<sup>3</sup> The mere possession of poison, or any other dangerous thing, involves no liability for its use by a person who had no right to touch it.<sup>4</sup>

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<sup>1</sup> Brass v. Maitland, 6 El. & B. 470; Farrant v. Barnes, 11 C. B. [N. S.] 553.

<sup>2</sup> Williams v. East India Co., 3 East, 192.

<sup>3</sup> See Brass v. Maitland, *supra*; Bailey v. Merrill, 3 Bulstr. 94.

<sup>4</sup> The defendants were merchants carrying on business in the store of a building, in the cellar of which the deceased was employed in repairing a sewer. In the cellar the defendants had placed three jars, the smaller one containing liquid *cyanate of potassium*, and two larger ones containing water. The jar containing poison was marked *poison* in letters legible enough for any one to read who should look for a label. The deceased was employed by a contractor under an agent of the proprietors of the building, who had charge of repairs, and the defendants and deceased stood in the simple position of strangers. The workmen were allowed to pass through the store down into the cellar, through a basement and into an area, where the sewer was undergoing repairs. When the work on the sewer began, in the front area of the cellar, where stood a hydrant with a cup for drinking, these jars were standing against the wall of the basement, not far from the hydrant, but were removed out of the way of the workmen, taken into the basement part of the cellar, and placed a few feet to one side of the passage leading through the basement to the stairs which ascended to the store above, and where a laborer passing up and down about his business, would not be likely to notice them, particularly, unless he went out of his way to examine them. The deceased, being sent up through the store to get a hatchet, and while going on this errand, and when at the distance of about one square from the store, he was observed to fall down sick, and died in an hour with all the symptoms of death by poison. The court held, that as the poison was intended for ordinary use in the defendants business, was kept where it would be extremely improbable that any person not acquainted with the use of the jars would fall upon it, and the jar being marked with the signs of poison in a way sufficient to warn any one but the most careless explorer of its dangerous character, no greater care could reasonably have been required of the defendants. That, as the deceased had no business to be meddling with the jars, and must have turned aside out of his way to reach them; and having a mere privilege of passing to and fro through the basement on this special occasion, was a trespasser upon the property of another; that if he really drank of that poison, he did so without the least examination for marks on the jar or on the cover, and, in short, was himself guilty of gross negligence, and his representatives could not recover for his injury (Callahan v. Warne, 40 Mo. 131).

## CHAPTER XXXIII.

### MEASURE OF DAMAGES IN ACTIONS FOR NEGLIGENCE.

- SEC. 594. Liability for tort greater than in contract.
- 595. Damages must be proximate.
- 596. Application of the rule.
- 597. Future damage.
- 598. Damages which might be avoided.
- 599. Loss of profits.
- 599 *a*. What profits may be allowed.
- 599 *b*. Profits in excess of value.
- 600. Exemplary damages.
- 601. Exemplary damages against masters.
- 602. Damage to real property.
- 603. Damage to chattels.
- 604. Damages in actions against sheriffs.
- 605. Telegraph companies.
- 606. Damages for personal injuries.
- 606 *a*. Value of time, how estimated.
- 606 *b*. Physical and mental suffering.
- 607. Exceptional rule in Pennsylvania.
- 608. Damages in favor of parent, master, &c.
- 608 *a*. Injury to feelings of parent.
- 609. Insurance not deducted from damages.
- 610. Damages in case of death.
- 611. Rule peculiar to Kentucky and Connecticut.
- 612. What is pecuniary damage.
- 613. Discretion of jury.

§ 594. The liability of a defendant for tortious negligence is broader than in an action on contract. He must answer not only for all the damage which a prudent man would expect to result from his fault, but also for all that a prudent man would anticipate as a possible consequence thereof. This is the narrowest limit that can be fixed to his liability. Whether it is not even broader than this, seems to be a doubtful question.<sup>1</sup> If the amount of

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<sup>1</sup> In *Harriss v. Mabry* (1 Ired. [N. C.] Law, 240), the court held that in an action upon a tort, the plaintiff may recover all such damages as may be properly considered the consequence of the wrongful act. But Pollock, C. B., said, on one occa-

damage sustained cannot be accurately determined, the wrong-doer must bear the burden of such difficulty, and where the evidence seems equally balanced between two or more amounts, must pay the larger sum.<sup>1</sup>

§ 595. It is a general rule that even a wrong-doer is only liable for the proximate consequences of his act or default. This rule is certainly applicable without qualification to cases of mere negligence. Injuries caused only remotely by an act of negligence cannot be charged to the person thus in fault.<sup>2</sup>

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sion: "I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated" (*Greenland v. Chaplin*, 5 Exch. 243). As to the necessity of pleading special damage, in order to recover it, see *Gilligan v. N. Y. & Harlem R. Co.*, 1 E. D. Smith, 453; *Solms v. Sias*, 16 Abb. Pr. 311; *Butler v. Kent*, 19 Johns. 233; *Laing v. Colder*, 8 Penn. St. 479; *Baldwin v. Western R. Co.*, 4 Gray, 333; *Patten v. Libbey*, 32 Maine, 878.

<sup>1</sup> Where a wrong has been committed, the wrong-doer must suffer from the impossibility of accurately ascertaining the amount of damage (*Leeds v. Amherst*, 20 Beav. 239).

<sup>2</sup> *Ryan v. N. Y. Central R. Co.*, 35 N. Y. 210. "In cases in which there is neither fraud, malice, or oppression, the law will not generally, in making compensation to the injured party, take into consideration remote or consequential damages. The measure of damages is the direct pecuniary loss sustained by the party" (per Allen, J., *Walrath v. Redfield*, 11 Barb. 368). "In cases of torts, it is necessary to show that the particular damage in respect of which plaintiff proceeds was the legal and natural consequence of the wrongful acts imputed to the defendant" (per Spencer, C. J., *Butler v. Kent*, 19 Johns. 223). Where, through the negligence of officers of a bank, some of its unsigned bills were stolen, and afterward the president's signature was forged upon them, it was held that the bank was not responsible (*Salem Bank v. Gloucester Bank*, 17 Mass. 1, 32). Parker, C. J., said: "Whatever might be the opinion of the court in the case of a direct damage happening to any one in consequence of the negligence or mismanagement of the officers of a bank, we are clear that for the indirect and remote consequence of the negligence in this case the corporation is not answerable" (*Ib.*) Where a corporation is authorized to build a dam across a stream, it will be liable for damages caused by an overflow of the banks by reason of the dam. They are not such remote and consequential damages as are not recoverable (*Teneyck v. Delaware & Raritan Canal*, 3 Harr. 200). Where the lessee of a store brought an action against the city of Boston for damages sustained by him in consequence of widening the adjoining street, evidence that his sales were less during the time when the street, as widened, was being fitted for use, than in the corresponding season of the next year, was held inadmissible, unless connected with other evidence tending to show that the diminution of business was

§ 596. The difficulty, as is usual in such cases, lies in the application of this principle, and in determining what are the proximate, and what the remote, consequences of a particular act. If an injury occurs, which would not have happened if nobody had been in fault, we think it may be traced back not only to the last person whose fault contributed to the injury, but also to any person whose fault so materially contributed thereto that without such fault the injury could not have happened, and of whose fault such an injury is a natural, even though not a necessary, consequence.<sup>1</sup>

§ 597. The plaintiff may recover not only the amount of damage which he suffered prior to the commencement of the action, but also all the damage, proceeding continuously from the injury complained of, which he has suffered up to the verdict,<sup>2</sup> and which it is reasonably certain that he will suffer in the future.<sup>3</sup> There must, however,

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in fact occasioned by the operation of widening the street (*Brooks v. Boston*, 19 Pick. 174).

<sup>1</sup> Thus in *Dixon v. Bell* (5 Maule & Selw. 198), the owner of a loaded gun, who placed it in the hands of a child, was held liable for the result of its negligent discharge by the child.

<sup>2</sup> In an action on the case, unless the injury complained of be of such a nature that actions can continually be brought from time to time, the jury may assess all the damages the plaintiff has sustained up to the time of the trial. They are not confined to the damages sustained previous to the date of the writ (*Daily v. Dismal Swamp Canal Co.*, 2 Ired. [N. C.] Law, 222).

<sup>3</sup> A jury in assessing damages against a railroad corporation, for an injury occasioned by its negligence, may take into consideration any permanent damage which the evidence shows is the natural consequence of the injury (*Frink v. Schroyer*, 18 Ill. 416; *Peoria Bridge Asso. v. Loomis*, 20 Id. 235). Where plaintiff was a passenger on defendants' cars, and sustained injuries through their negligence, having her ankle and leg bruised and injured, and a running sore created which was not cured at the time of the trial, nearly two years after the accident,—held, that the damages recoverable by her were not limited to the bodily pain incurred before the trial, but extended to such future suffering as, from the evidence, it was reasonably certain must necessarily result from the injuries incurred (*Curtis v. Rochester & Syracuse R. Co.*, 18 N. Y. 534; affirming S. C., 20 Barb. 282). In a suit by the husband to recover damages for an injury to the wife, caused by the negligence of defendants, held, that the actual expenses incurred by the husband, after the commencement of

be a reasonable certainty as to such future damage. A mere *probability* of its occurrence is not enough.<sup>1</sup>

§ 598. It is universally conceded that the plaintiff cannot recover compensation for damage which he might have avoided by the use of slight care and diligence, after first becoming aware of the injury of which he complains.<sup>2</sup> Thus, where cattle designed for food are injured by the defendant's negligence, yet remain fit for slaughter, the plaintiff is not at liberty to abandon them, and recover their full value. He must dispose of them to the best advantage, and can only recover the loss which he would sustain by doing so.<sup>3</sup> We think, too, that in conformity to the general rule concerning contributory negligence, the plaintiff cannot recover for damage which he might have avoided by the use of *ordinary* care and diligence. And it has been so held.<sup>4</sup> There is a case<sup>5</sup> in which a charge to

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the suit, may be given in evidence to show the amount of his damage, and that, if the condition of the wife is such at the time of the trial as to disable her for the future, and require further expenses for medical and surgical treatment, the jury may give damages for prospective expenses and loss of service (*Hopkins v. Atlantic & St. Lawrence R. Co.*, 36 N. H. 9). In awarding damages to a married woman, in an action by husband and wife, for an injury sustained by the defendant's negligence, the jury may consider the length of time she will be ill in consequence (*Hunt v. Hoyt*, 29 Ill. 544).

<sup>1</sup> Per Selden, J., *Curtis v. Rochester & Syracuse R. Co.*, 18 N. Y. 534, 542.

<sup>2</sup> *Worth v. Edwards*, 52 Barb. 40. The injured party cannot recover for damages which, at a trifling expense or by reasonable exertions, he might have prevented (*Douglas v. Stephens*, 18 Mo. 362).

<sup>3</sup> *Illinois &c. R. Co. v. Finnigan*, 21 Ill. 646.

<sup>4</sup> *State ex rel. Rice v. Powell*, 44 Mo. 436. See *Sherman v. Fall River Iron Works* (2 Allen, 524), where it was held that the plaintiff could not recover for damage to his horses, caused by their drinking water fouled by the defendant, after plaintiff became aware of the state of the water. See also *Wright v. Illinois &c. R. Co.*, 20 Iowa, 195.

<sup>5</sup> *Chase v. N. Y. Central R. Co.*, 24 Barb. 273. The defendants were guilty of negligence whereby the plaintiff was injured. The plaintiff, by his own negligence in not observing his surgeon's instructions, aggravated the injury. On the trial the judge refused to charge that the plaintiff could not recover for any thing after or following his own imprudence, but did charge that the defendants were responsible for all the injuries resulting from their negligence. Held, that the charge was correct (*Laurence v. Housatonic R. Co.*, 29 Conn. 390).

this effect was held erroneous ; but the decision was based entirely upon the assumption that the jury could not understand such language ; and the exception to the charge was made by the defendant, in whose favor a new trial was granted. As no one will pretend that an injured person is bound to take *extraordinary* care to avoid damage,<sup>1</sup> the decision is not an authority upon this point, if upon any other.

§ 599. The current of the earlier decisions upon the subject appears to be opposed to any allowance for the plaintiff's loss of profits, though plainly resulting from the defendant's negligence. Thus, in cases of collision between vessels, the courts of admiralty and of common law have refused to allow for profits which the injured vessel might probably have made upon a new voyage from her port of destination,<sup>2</sup> or even by completing the voyage which was broken up.<sup>3</sup> And where a steamboat was delayed by obstructions negligently placed in the river, it has been recently held in Massachusetts that the owner of the boat could not recover for profits which he could have made meantime.<sup>4</sup> Similar decisions have been made in respect to the wrongful attachment of vessels.<sup>5</sup> But later decisions expressly allow the recovery of profits, where they would to a reasonable certainty have been

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<sup>1</sup> The plaintiff is certainly not debarred from recovering from the party by whose fault he was wounded all the damage which ensues, though part of it is caused by a surgeon's unskillfulness, if the surgeon bore a good reputation for skill (*Stover v. Bluehill*, 51 Maine, 439).

<sup>2</sup> *Smith v. Condry*, 1 How. [U. S.] 28. The same ruling was made in cases of illegal prize captures and detentions, where the action was brought against persons who were not willful wrong-doers (*The Schooner Lively*, 1 Gall. 314; *The Anna Maria*, 2 Wheat. 327; *The Amiable Nancy*, 3 Id. 546).

<sup>3</sup> *Hunt v. Hoboken Land Improvement Co.*, 3 E. D. Smith, 144.

<sup>4</sup> *Benson v. Malden &c. Gas Co.*, 6 Allen, 149.

<sup>5</sup> See *Boyd v. Brown*, 17 Pick. 453; *Callaway Mining &c. Co. v. Clark*, 32 Mo. 305.

earned, had not the injury occurred.<sup>1</sup> In Great Britain, New York, and Connecticut, the allowance of profits is a settled rule.<sup>2</sup>

§ 599 *a*. Speculative and merely possible profits are never allowed. The source of profit must be ascertained, and its extent defined; and its realization must appear to have been reasonably certain. Nothing can be allowed

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<sup>1</sup> *Heard v. Holman*, 19 C. B. [N. S.] 1; *The Narragansett*, Olcott, 388; *Williamson v. Barrett*, 13 How. [U. S.] 106; *The Rhode Island*, 2 Blatchf. 113; *The Lake*, 2 Wallace, Jr. 52.

<sup>2</sup> See *Griffin v. Colver*, 16 N. Y. 489, a case arising on contract, in which the whole question is discussed. Plaintiff kept a refectory opposite to a market. In repairing this market, obstructions were placed in the street by defendants, by which he sustained injury. Held, that plaintiff, on showing his title to recover at all, was entitled to recover the loss sustained by him in his business during the continuance of the obstructions, and caused by them, by proving the actual diminution of his receipts, and increase of his expenses during that time (*St. John v. Mayor &c. of New York*, 6 Duer, 315). "In actions against a tortfeasor, the loss of profits may be taken into view in estimating the damages, though in actions for a breach of contract the general rule is otherwise. This does not necessarily embrace a right to recover purely contingent or speculative profits, but will warrant the recovery for such losses as are proved to be the direct consequence of the wrong which is to be redressed." Per Woodruff, J. (*Walker v. Post*, 6 Duer, 363, 373). Where, through negligence of the defendants in grading certain streets, plaintiff's land was overflowed, and he was obliged to repair his mill, and to suspend work on it for fourteen days, held, that plaintiff was entitled to a compensation for the loss of profits during the suspension, it being proved that the suspension was the necessary consequence of the injuries sustained, and also that the profits would certainly have been realized (*Lacour v. Mayor &c. of New York*, 3 Duer, 406). Where the plaintiff's toll bridge was carried away by the defendant's fault, it was held that the rule for assessing damages was the value of the superstructure, or so much of it as was carried away and lost, and the loss of tolls during the time that was reasonably necessary to repair or rebuild (*Sewall's Fall Bridge v. Fisk*, 3 Foster, 171). The plaintiff came to the depot of the defendant for the purpose of taking away a load of goods, and was directed by an officer of the defendant where to back his wagon and receive the load. While loading the wagon, he was run into by a train of the defendant's, and his wagon was badly damaged. Held, that the rule of damages was the damage to the wagon, the loss of the trip in which the plaintiff was engaged, and the loss of the use of the wagon, until, by due diligence, the plaintiff could get it repaired (*Shelbyville Lateral Branch R. Co. v. Newark*, 4 Ind. 471). In an action for an injury to the plaintiff's steamboat, the court charged the jury, that, if the plaintiff was entitled to recover at all, he was entitled to recover as damages a reasonable sum for the damage which the boat had sustained by the conduct complained of, and a reasonable sum for her detention while she was undergoing repairs. Held, that the charge was correct (*New Haven Steamboat Co. v. Vanderbilt*, 16 Conn. 420).



for the loss of profits in an illegal business, such, for example, as a traffic carried on without the license required by a statute.<sup>1</sup> Profits can only be allowed for a period of delay which the plaintiff could not avoid. Where the negligence of the defendant causes the total destruction of an article of property, the plaintiff can only recover such profits as were then being actually earned from it, and could not be earned by replacing the property with the utmost promptness; because he recovers the whole value of the thing destroyed, and is, therefore, supposed to have been able to replace it immediately, and to go on with his business.<sup>2</sup> Any other rule would enable the plaintiff to recover profits for an endless period. And where the injury is merely partial, the plaintiff can recover profits only for such time as it would necessarily take to repair the thing.<sup>3</sup>

§ 599 b. In no case should the plaintiff be allowed to recover profits exceeding the value of the property injured or delayed, unless the circumstances were such that a reasonable and prudent man could not have foreseen that they would reach such an amount during the delay, or unless the thing could not be replaced within the period in which such profits would have been earned, or unless the plaintiff has been induced by the defendant to refrain from purchasing other property in place of that the use of

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<sup>1</sup> So held as to an unlicensed liquor store (*Kane v. Johnston*, 9 Bosw. 154) and livery stable (*Sherman v. Fall River Iron Works Co.*, 2 Allen, 524; S. C. again, 5 Id. 213).

<sup>2</sup> See an attempt made to establish such a measure of damages in a singular case of contract (*Russell v. Roberts*, 3 E. D. Smith, 318).

<sup>3</sup> Thus, in *Ludlow v. Yonkers* (43 Barb. 493), where the plaintiff's mill was injured, in 1861, by the defendant's negligence in building a wall, and, on the trial of the cause, in 1864, it appeared that the injury had never been repaired, and the mill had never since been fit for use, the referee allowed the rent of the mill for the whole time as damages. On appeal, a new trial was ordered, the court holding that, if rent was recoverable at all, it could be only for such time as it would take to repair the injury.

which has been delayed. Thus, if by the defendant's fault a vessel is delayed on a profitable voyage, and it is plain at the outset that the delay will consume more profit than the cost of chartering a similar vessel, and reshipping the cargo, the shipowner ought to adopt the latter course, abandoning the whole voyage of the other vessel to the defendant. And, in such case, the cost of such charter and reshipment would be the extreme limit of the defendant's liability. But profits lost during the interval which must necessarily elapse before the charter of a new vessel could be effected, and the cargo reshipped, may be recovered in full, whatever their amount may be. And if the defendant should dissuade the plaintiff from chartering another vessel, by assurances that the obstruction would be removed within a period, in which the loss of profits would be less than the cost of reshipment, the plaintiff would be justified in relying upon such assurances, and ought to recover all that he loses by doing so.

§ 600. Exemplary, vindictive, or punitive damages can never be recovered in actions upon any thing less than gross negligence. Of this there can be no doubt. There are many reported cases of mere ordinary negligence in which damages have been awarded by juries to so large an amount as to seem equivalent to exemplary damages; but where such verdicts have been allowed to stand, it has been upon the ground that the court could not clearly see that the amount awarded was more than a just compensation for the injury. It is often said that exemplary damages may be awarded for gross negligence.<sup>1</sup> But it should be

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<sup>1</sup> Where the jury were at liberty, from the evidence, to find that the injury complained of was caused either by the gross negligence of the defendant, or the wanton mischief of his agents, a verdict awarding exemplary damages will not be disturbed (*Vicksburg & Jackson R. Co. v. Patton*, 31 Miss. 156). Exemplary damages may be recovered in actions for injuries caused by the gross negligence of the defendant, as well as in actions for forcible injuries (*Kountz v. Brown*, 16 B. Monr. 577). The jury may, in their discretion, give exemplary damages where a personal injury has been

distinctly understood that gross negligence means such entire want of care as to raise a presumption that the person in fault is conscious of the probable consequences of his carelessness, and is indifferent, or worse, to the danger of injury to the persons or property of others. And such appears to us to be the construction put upon these words by the courts, in the cases referred to.<sup>1</sup> It is only in cases

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caused by the gross carelessness of a railroad in the management of its trains (*Hopkins v. Atlantic & St. Lawrence R. Co.*, 36 N. H. 9). If a stage proprietor is guilty of gross negligence, such as the employment of a drunken driver, it amounts to that kind of gross misconduct which will justify exemplary damages (*Frink v. Coe*, 4 Greene [Iowa], 555). A plaintiff seeking to recover for medical mistreatment of himself, if he prove gross negligence in the defendant's treatment of his disease, may recover vindictive damages (*Cochrane v. Miller*, 13 Iowa, 128).

<sup>1</sup> Plaintiff was a coal merchant, and owned a stable, horse, and wagon, &c. The defendant was the owner of the adjoining house and lot, and commenced pulling down the house, and, in the course of demolishing it, a beam fell on the stable of the plaintiff, stripping off the roof, which fell on the plaintiff's horse and wagon. It was proved on the trial that the plaintiff had remonstrated with the defendant at the time, but he said that the plaintiff had served him with a lawyer's letter and writ, and that he would go on; and it was also proved that the defendant had applied to the plaintiff to purchase his premises, and that the plaintiff had refused. Held, that the jury might take into consideration the motives of the defendant, and if the negligence was accompanied with a contempt of the plaintiff's rights and convenience, they might give exemplary damages (*Emblen v. Myers*, 6 Hurlst. & N. 54). "There is a difference between an injury which is the mere result of such negligence as amounts to little more than accident, and an injury, willful or negligent, which is accompanied by expressions of insolence. I do not say that in actions for negligence there should be vindictive damages, such as are sometimes given in actions of trespass, but the measure of damages should be different, according to the nature of the injury and the circumstances with which it is accompanied" (per Pollock, C. B., *Emblen v. Myers*, 6 Hurlst. & N. 54, 58). Where plaintiff was injured by falling at night into a hole in the sidewalk, which it was the duty of defendants to repair, it was held that the recovery of punitive or vindictive damages is allowed only where the act causing the injury has been willfully done, or where the circumstances show that there was a deliberate, preconceived, or positive intention to injure, or that reckless disregard of the safety of person or property, which is equally culpable (*Wallace v. Mayor &c. of New York*, 2 Hilt. 440). In cases of negligence simply, the rule is to allow the actual damages. An award of "smart money," in such cases, should not be allowed (*Moody v. McDonald*, 4 Cal. 297). Where a building was in course of demolition, and in consequence of a want of sufficient notice of danger to passers-by, a person was injured by the falling of a wall, it was held that, when, in such a case, the proprietor, through an error of judgment, had not given sufficient notice, vindictive damages should not be allowed (*Jackson v. Schmidt*, 14 La. Ann. 806).

of such recklessness that, in our opinion, exemplary damages should be allowed.<sup>1</sup>

§ 601. In general, it may be said that exemplary damages cannot be allowed against a master for the negligence of his servants, however gross, if he is personally free from fault,<sup>2</sup> and has maintained personal supervision over them. But this rule is not applicable, without qualification, to the case of a corporation or association, having no power to act except through agents. In such cases, the negligence of a superintending agent must be deemed the negligence of the association itself. In any case where exemplary damages would be recoverable against the servant in fault, they should be allowed against the master, if it appears that he had reasonable notice of the negligent habits of the servant,<sup>3</sup> or if he left the servant without control or supervision in the work. One who retains a servant, with knowledge of his negligent habits, very clearly assumes all the risks of such habits. And one who abandons affairs entirely to his servants ought also to be prepared to answer for them to the fullest extent. For servants are generally irresponsible, and act without a sense of their duty to the public sufficient to keep them from carelessness. The eye of the master is an invaluable guaranty of care; and when that is withdrawn, the master, and not society at large, should bear the consequences of its absence. For these

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<sup>1</sup> Punitive or vindictive damages can be recovered only in cases where person or property has been injured by the willful act of another, or where the act causing the injury was the result of wantonness or reckless indifference to the rights of others (Wallace v. Mayor &c. of New York, 2 Hilt. 440; Heil v. Glanding, 42 Penn. St. 493):

<sup>2</sup> Defendant was the owner of a house adjoining the public street, in which there was a hole or pit leading to his cellar. This was left uncovered by defendant's workmen, without his knowledge, and plaintiff fell into it and broke his leg. Held, error to instruct the jury that they might give exemplary damages (Morford v. Woodworth, 7 Ind. 83).

<sup>3</sup> The employment of a known drunken driver is gross negligence, and exemplary damages should be given for injuries caused thereby (Frink v. Coe, 4 Greene [Iowa] 555).

reasons a stage-owner ought to be liable to the fullest extent for the negligence of the drivers, when neither he nor his superintendent is actually looking after them, as well as when he directly connives at their acts;<sup>1</sup> while he ought not to be liable for exemplary damages where the injury is the result of the driver's disregard of his orders in his presence, or immediately after leaving it. So a railroad company should not be excused from liability for exemplary damages by any amount of general orders against negligence, but should not be liable to this extent for the willful disobedience of a conductor or engineer to the order (while fresh) of a superintendent actually on the train, nor for the like disobedience of a brakeman to the order of a conductor.

§ 602. In an action for a negligent injury to real property, the rule of damages generally adopted is to allow to the plaintiff the difference between the market value of the land immediately before the injury occurred, and the like value immediately after the injury is complete,<sup>2</sup> and

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<sup>1</sup> A passenger in a steamboat, in an action against the owner for damages, having proved the injury to himself through the negligence of the master and crew, offered further evidence to show that, while sitting upon the wharf immediately after the injury, he applied to the master for some of his men to assist him into a carriage, who refused, saying that he had enough for his men to do on board. Held, that such evidence was admissible, because such conduct of the master was part of the transaction in question, and because it was proper for the purpose of showing the damage sustained (*Hall v. Conn. River Steamboat Co.*, 13 Conn. 319).

<sup>2</sup> Where injury was done to plaintiff's house, &c., by water being turned thereon by the construction of a railroad, the court charged the jury that the rule of damages in this class of cases was the difference between the value of the plaintiff's premises before the injury happened, and the value immediately after the injury, taking into account only the damages which had resulted from the defendant's acts. "This part of the charge, as a general proposition, is unexceptionable" (per Mullett, J., *Chase v. N. Y. Central R. Co.*, 24 Barb. 273). In an action against a railway company for carelessly letting sparks fly from their engines, so as to set the herbage on fire—the compensation in such case should be measured as in the case of an unwilling vendor (*Gibson v. South Eastern R. Co.*, 1 Fost. & F. 23). The measure of damages occasioned by backing water on land, is "the difference between what the property would have sold for as affected by the injury and what it would have brought unaffected thereby. The time of estimating the damage is when the injury is complete" (*Schuylkill Nav. Co. v. Farr*, 4 Watts & Serg. 362).

not to take into consideration the cost of repairing the injury so as to replace the land in its former condition.<sup>1</sup> But this rule is not universally applied, and, therefore, needs more qualification than can be fully ascertained from the decisions. For where the injury could have been repaired at an expense much less than the depreciation in the market of the whole land, the plaintiff has only been allowed to recover the expense of such repair;<sup>2</sup> and, on the other hand, where growing trees were destroyed by a fire, originating in sparks dropping from the defendant's locomotive, the plaintiff was allowed to recover the value of the trees, apart from the land.<sup>3</sup> Indeed it is obvious that a right application of the supposed rule would operate most unjustly in some cases. Thus, a city lot, owned by a florist, might be in such demand for building purposes as to be worth at least as much after every shrub on it had been destroyed, as it was before, yet it would be absurd to deny him all relief against one who by negligence destroyed all the flowers and plants in the ground. So, on the other hand, a broken down wall, which could be repaired at a slight expense, might so disfigure an otherwise desirable tract of land as to depreciate the whole

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<sup>1</sup> In an action to recover for the falling in of land consequent on the excavation of adjoining land by the defendant, "the measure of damages is, not what it would cost to restore the lot to its former situation, or to build a wall to support it, but what the lot is diminished in value by reason of the acts of the defendant" (*McGuire v. Grant*, 1 Dutch. 356). Where, by negligence of A. in building his house adjoining that of B., the latter house is thrown down, A. is liable only for the value of the old house, and not for the whole expense of building a new one (*Lukin v. Godsall*, Peake's Add. Cases, 15). The same test was applied where the water running into the plaintiff's mill was choked with tan-bark, &c. (*Honsee v. Hammond*, 39 Barb. 89).

<sup>2</sup> *Terry v. Mayor &c. of N. Y.*, 8 Bosw. 404.

<sup>3</sup> *Whitbeck v. N. Y. Central R. Co.*, 36 Barb. 644. In that case, Johnson, J., said: "The true rule I conceive to be this: that if the thing destroyed, although it is part of the realty, has a value which can be accurately measured and ascertained without reference to the value of the soil in which it stands, or out of which it grows, the recovery must be for the value of the thing thus destroyed, and not for the difference in the value of the land before and after such destruction" (see *Chicago & Rock I. R. Co. v. Ward*, 16 Ill. 522; *Hassa v. Junger*, 15 Wisc. 578).

very materially, so long as it remained—a depreciation for which the defendant surely ought not to pay. The rule which appears to us most consistent with justice, and most easily reconcilable with all the decisions, is this: That if the plaintiff, acting as a prudent man and without expectation of reimbursement, would have repaired the injury, he should be allowed the cost of such repair; but if he would not, under such circumstances, have done so, he should be allowed only the depreciation in the value of his property, unless the thing injured had a market value separate from the land, although attached thereto, in which case he should be allowed for the depreciation of that particular thing. Where the cost of repairs is recovered, the plaintiff should be allowed only for so much repair as is necessary to restore the property to its former condition; and if, as in the case of an old and decayed building, it cannot be repaired without making it more valuable than it was before, a reasonable deduction should be made in favor of the defendant on this account. Where water used for drinking purposes has been spoiled, the owner may recover compensation for the expense of procuring other water fit for the same use.<sup>1</sup> If a certain portion of the damage must have befallen the plaintiff in any event, that portion must be deducted from the amount otherwise recoverable from the defendant.<sup>2</sup>

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<sup>1</sup> In an action for injury to a well by rendering the water impure, to ascertain the damages, the cost of furnishing water to the family, having regard to quality and quantity, may be taken into account in the estimate, also the difference in value of the property owing to the erection of a gas and other offensive structures in the vicinity (*Ottawa Gas &c. Co. v. Graham*, 28 Ill. 73).

<sup>2</sup> A railway embankment pent up the flood-waters of a river and caused them to flow over land of the plaintiff, doing injury to a certain amount. Had the embankment not been constructed, the waters would have flowed a different way, but would have reached plaintiffs' land, and would have done damage to a less amount. Held, that the measure of damages recoverable by the plaintiff against the railway company was the difference only between the two amounts (*Workman v. Great Northern R. Co.*, 32 Law Jour. [Q. B.] 279).

§ 603. In an action for negligent injury to, or loss of, personal property, the plaintiff is entitled to recover upon much the same principles as those which have been stated in respect to real property. Where a chattel has been totally lost to him, he should recover its full value, according to the market rates current at the time of the loss,<sup>1</sup> if it is a thing ordinarily bought and sold on the market; and partial loss or injury should be estimated on the same basis, allowing a due proportion of the value. No subsequent rise or fall of price should be regarded. And even if the article is intrinsically worthless, yet if it had a fair market value at the time of its loss or injury, that price must govern; but where the price is a purely speculative one, put upon the thing by a few persons combining together, it furnishes no criterion for the measure of damages.<sup>2</sup> Reasonable damages, exceeding the market price, may be allowed for the loss of a chattel having a

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<sup>1</sup> Where a hired slave loses his life through the negligence of the hirer, the owner is entitled to the full value. A jury cannot legally give a less sum by an arbitrary assessment (*Wise v. Freshly*, 3 McCord, 547). The measure of damages in an action on the case against a railroad company for negligence, whereby certain slaves of the plaintiff were permitted to escape, was held to be not the full value of the property, but to lie in the discretion of the jury, after a consideration of the circumstances of the case (*O'Neal v. South Carolina R. Co.*, 9 Rich. Law, 465).

<sup>2</sup> Plaintiff delivered to defendant, to be carried from Troy to Lyons, about 5,000 mulberry trees or seedlings of the Alpine species, and on the way they were damaged. Held, on the trial, that the measure of damages was their market price at the time of the injury, even though subsequent experience allowed that the market price was almost wholly imaginary, their real value being little or nothing (*Smith v. Griffith*, 3 Hill, 333). In that case, Nelson, C. J., said: "If goods are wholly lost or destroyed the owner is entitled to their full worth at the time of such loss or destruction. And, upon the same principle, if the goods are partially injured, and the party seeks redress for the qualified damage, the measure should be in like proportion. Assuming that there is no defect in the quality of the article, the fair test of its value, and consequently of the loss to the owner, if it has been destroyed, is the price at the time in the market. This makes him whole, because the fund recovered enables him to go into the market and supply himself again with the goods of which he has been deprived. I admit that a mere speculative price of the article, got up through the contrivance of a few interested dealers with a view to control the market for their own private end, is not the true test. The law, in regulating the measure of damages, contemplates a range of the entire market, and the average of prices as thus found, running through a reasonable period of time."



peculiar value to the plaintiff. But such damages are allowed with much caution, and only when clearly ascertained. As a general rule, the full value of a chattel is the utmost amount that can be recovered for its loss ; and where that value is allowed, nothing can be added for the expense of procuring a temporary substitute.<sup>1</sup> But in cases of injury to animals not intended merely for food, the plaintiff ought to recover for expenses reasonably incurred in efforts to cure them, in addition to the depreciation in their value, or to their whole value where they are finally lost.<sup>2</sup> The law would be inhuman in its tendency if it should prescribe a different rule, even where the animal eventually dies, since it would then offer an inducement to the owner to neglect its sufferings.

§ 604. In an action for not returning an execution, the presumptive measure of damages is the amount to be raised by the execution ; and although the sheriff may show in mitigation that the judgment debtor had no property upon which he could have levied,<sup>3</sup> he cannot show that the judgment is still collectable.<sup>4</sup> Where it appears,

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<sup>1</sup> *Edwards v. Beebe*, 48 Barb. 106 ; see *Russell v. Roberts*, 3 E. D. Smith, 318.

<sup>2</sup> Where a bridge company adopted as a part of their bridge a way made by individuals from the highway to the bridge, and, in passing over such way, a traveler's horses were injured through a defect in it. Held, that he was entitled to recover, in addition to the value of the horses, for the prudent expenditure of money in order to effect a cure (*Watson v. Lisbon Bridge Co.*, 14 Maine, 201 ; but such damages cannot be recovered, unless specially pleaded (*Patton v. Libbey*, 32 Maine, 378). In a similar action in Massachusetts, the rule was stated to be that the plaintiff was entitled to recover the diminution, occasioned by the injury, in the market value of the horse at the commencement of the action, and, in addition, such sums as the plaintiff has paid out in reasonable attempts to cure him, with a reasonable compensation for his services in attempting to cure him, and a reasonable sum as compensation for the loss of the use of the horse while under such treatment, provided, that the whole damage allowed does not exceed the value of the horse (*Gillett v. Western R. Co.*, 8 Allen, 560).

<sup>3</sup> *Humphrey v. Hathorn*, 24 Barb. 278 ; *Ledyard v. Jones*, 7 N. Y. 550 ; *Bowman v. Cornell*, 39 Barb. 69 ; *Swezey v. Lott*, 21 N. Y. 481 ; *Bank of Rome v. Curtiss*, 1 Hill, 275.

<sup>4</sup> *Ledyard v. Jones*, 7 N. Y. 550 ; and cases *supra*.

therefore, that the defendant in the execution had sufficient property to satisfy the same, the measure of damages for not returning such execution is the amount directed to be levied by the execution.<sup>1</sup> But actual damages need not be proved. It is enough that the process was not returned on the return day, without a reasonable excuse for the neglect.<sup>2</sup> The measure of damages in an action against the sheriff for a false return is the amount directed to be collected upon the execution, if there was sufficient property to levy it upon;<sup>3</sup> or, at all events, it is the value of the property which the plaintiff would have been enabled to apply in satisfaction of the execution.<sup>4</sup>

§ 605. In case of failure to deliver a telegraphic message relating to business, the measure of damages should be so much of the loss actually sustained as a person, familiar with business of the kind mentioned in the message, would be able to anticipate from its terms as a probable consequence of failure to deliver it. If the terms of the message do not convey its full value, the sender must inform the operator of that value, if he desires to hold the company to a corresponding responsibility; and even then he cannot recover for such additional value in case of neglect occurring at any other point than the place at which the message was first received, for the operator is clearly not bound to telegraph the peculiar information which he has received, unless paid for so doing.<sup>5</sup> Accordingly, it has been held that

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<sup>1</sup> *Ledyard v. Jones*, 7 N. Y. 550; *Bowman v. Cornell*, 39 Barb. 69; *People v. Lott*, 21 Barb. 130; *Bank of Rome v. Curtiss*, 1 Hill, 275; *Perkins v. Pitman*, 34 N. H. 261; *Smith v. Tooke*, 20 Texas, 750; *Reid v. Dunklin*, 5 Ala. [N. S.] 205.

<sup>2</sup> *Swezey v. Lott*, 21 N. Y. 481; *Pardee v. Robertson*, 6 Hill, 550; *Keith v. Commonwealth*, 5 J. J. Marsh. 359; *Runlett v. Bell*, 5 N. H. 433; *Laffin v. Willard*, 16 Pick. 64; *Weld v. Bartlett*, 10 Mass. 474; *Goodnow v. Willard*, 5 Metc. 517.

<sup>3</sup> *Bacon v. Cropsey*, 7 N. Y. 195.

<sup>4</sup> *Thayer v. Roberts*, 44 Maine, 247; see *Sedgwick on Damages*, 4th ed. 599, 612.

<sup>5</sup> *United States Tel. Co. v. Gildersleeve*, 29 Md. 232. The decision in *Bryant v.*

for delay in delivering a telegram directing the payment or receipt of money, only interest during the period of delay could be recovered, although the money was to be used in completing a purchase upon which there was an assured profit of much greater amount.<sup>1</sup> But it is not necessary that the amount of pecuniary damage should be apparent upon the face of the telegram. If a number of articles are called for, the company will be liable in case of non-delivery of the message, for the utmost loss which arises from the want of that number of similar articles, whatever may be the price;<sup>2</sup> but it will not be liable for a greater number of articles, even at the lowest price.<sup>3</sup> In case of such delay in delivering a telegram directing the commencement of legal proceedings as prevents them from having proper effect, the company will be liable for the amount which might be secured by such proceedings, so far as that amount, and the fact that its recovery depends entirely upon the prompt delivery of the message, appear by the terms of the telegram.<sup>4</sup> In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the

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American Tel. Co. (1 Daly, 575) was contrary to this theory; but that decision was reversed in the Court of Appeals, in June, 1870.

<sup>1</sup> Landsberger v. Magnetic Telegraph Co., 32 Barb. 530.

<sup>2</sup> See N. Y. & Washington Tel. Co. v. Dryburg, 35 Penn. St. 298. Where a telegram directing the purchase of stock was not delivered, the company was held liable for the difference between the price at the time the message ought to have been delivered, and the price at which the stock was purchased upon order by mail (United States Tel. Co. v. Wenger, 55 Penn. St. 262; see Squire v. Western Union Tel. Co., 98 Mass. 232).

<sup>3</sup> In Rittenhouse v. Independent Tel. Co. (1 Daly, 474), it was held that a telegraph company was liable for a loss on five *hundred* shares, where only *five* were telegraphed for, it appearing to be usual thus to abridge messages between brokers. But Bryant v. American Tel. Co. (1 Daly, 575), decided by the same court, and upon the same principles, has been reversed in the New York Court of Appeals.

<sup>4</sup> Parks v. Alta California Tel. Co., 13 Cal. 422; Bryant v. American Tel. Co., 1 Daly, 575. The latter decision has been reversed, but we believe not upon this ground.

company in fault ought to escape with mere nominal damages, on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings, which cannot easily be estimated in money, but for which a jury should be at liberty to award fair damages. Yet in such cases the damages ought not to be enhanced by evidence of any circumstances which could not reasonably have been anticipated as probable from the language of the written message.

§ 606. In an action for negligent injury to the person of the plaintiff, he may recover the expense of his cure,<sup>1</sup> the value of the time lost by him during his cure,<sup>2</sup> and a fair compensation for the physical<sup>3</sup> and mental<sup>4</sup> suffering caused by the injury, as well as for any permanent reduc-

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<sup>1</sup> Peoria Bridge Asso. v. Loomis, 20 Ill. 235; Beardsley v. Swann, 4 McLean, 333; see Ransom v. N. Y. & Erie R. Co., 15 N. Y. 415. If the plaintiff is a married woman, it must appear that she paid out of her *separate estate* any expenses which she seeks to recover (Moody v. Osgood, 50 Barb. 628).

<sup>2</sup> Wade v. Leroy, 20 How. [U. S.] 34; Beardsley v. Swann, 4 McLean, 333; Peoria Bridge Asso. v. Loomis, 20 Ill. 235; see Morse v. Auburn & Syracuse R. Co., 10 Barb. 621.

<sup>3</sup> Plaintiff, being a passenger in the cars of defendants, was seriously injured in consequence of a collision. Held, that he might recover damages as well for the pain and suffering which he underwent, as for the actual pecuniary loss suffered by him (Ransom v. N. Y. & Erie R. Co., 15 N. Y. 415. To the same effect are the cases of Curtis v. Rochester & Syracuse R. Co., 20 Barb. 282; Morse v. Auburn & Syracuse R. Co., 10 Barb. 621; Peoria Bridge Asso. v. Loomis, 20 Ill. 235; Beardsley v. Swann, 4 McLean, 333; see Linsley v. Bushnell, 15 Conn. 225). In estimating damages for an assault, unintentionally but recklessly committed, the jury may consider the pain as well as the wounded feelings of the female plaintiff (West v. Forrest, 22 Mo. 344).

<sup>4</sup> The jury, in estimating the damages, may take into consideration the anxiety and mental suffering of the plaintiff at the time of the occurrence of the injury, naturally incident to the risk and danger of the occasion (Masters v. Warren, 27 Conn. 293). The mental suffering and anxiety caused by the apprehension of danger, or by efforts to escape from the consequences of the injury, may be considered by the jury (Seeger v. Barkhamsted, 22 Conn. 290; Canning v. Williamstown, 1 Cush. 451).

tion of his power to earn money.<sup>1</sup> The cases in which exemplary damages may be recovered for injuries to the person have been stated in the section on that subject. A jury has not an unlimited discretion to award such damages in every case.<sup>2</sup>

§ 606 a. The value of the plaintiff's time should be estimated with due regard to his actual earnings, and not upon any uniform valuation of time. And if he uses his time for any valuable purpose, though he does not actually earn money by it, he should be allowed the reasonable value thereof. Thus, a scientific man, having sufficient means of support without labor, may devote his time to the pursuit of study and research, with great ultimate benefit, even in a strict pecuniary sense, to the world. For the loss of time which he would have thus spent, he is as much entitled to compensation as if he had received a regular salary for his services, since it is fair to presume

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<sup>1</sup> In an action to recover damages for a personal injury done the plaintiff, by the negligent driving and upsetting a stage-coach, the jury, in estimating his damages, are to consider what, before the injury complained of, was the health and physical and mental ability of the plaintiff to maintain his family, as compared with his condition in those particulars, after and up to the institution of the suit, in consequence of the injury complained of, and how far it is permanent in its results, as well as the physical and mental suffering he has sustained by such injury, and should allow such damages as, in their opinion, will fairly compensate the plaintiff for the loss and injury which they may find he has so sustained (*Stockton v. Frey*, 4 Gill, 406). In an action against the owners of a steam ferry-boat, for personal injuries sustained by the negligence and mismanagement of its servants, it was held that the plaintiff might prove that he was engaged in a particular business, for which he has been incapacitated, as exhibiting the extent of the injury, and that it was followed by expense, suffering, and loss of time, which had for him a pecuniary value, though the declaration contained no specification of such business, or any statement that he was obliged to relinquish the same (*Wade v. Leroy*, 20 How. [U. S.] 34; *S. P.*, *Curtis v. Rochester & Syr. R. Co.*, 20 Barb. 282; affirmed, 18 N. Y. 534; *Winters v. Hannibal &c. R. Co.*, 39 Mo. 468. But, in Massachusetts, such damages must be specially pleaded (*Baldwin v. Western R. Co.*, 4 Gray, 333).

<sup>2</sup> Where the court charged "that there was no certain rule, by which to estimate the damages for the personal injury to the plaintiff, and that the jury will fix them at such sum as they think right and proper under the evidence," held, that the instruction should have been more precise, and that as the injury was not willful, there was no room for vindictive damages (*Heil v. Glanding*, 42 Penn. St. 493).

that one who is capable of such labors could, if he chose, earn a liberal income. But if the plaintiff has been accustomed not only to live upon his property, but to spend his time in mere pleasure seeking, he ought not to recover any thing for the loss of his time, since the other items of damage afford sufficient compensation to him.

§ 606 b. The amount allowed for physical suffering cannot be varied by any difference between the external circumstances of persons injured ; but their bodily capacity to overcome pain may properly be considered, in the absence of any direct evidence of the extent of pain actually endured. The mental suffering which may be allowed for is only such as arises from the plaintiff's reflections upon what he personally has to endure, or anxiety for his escape. His distress, in view of the consequences which his disability may bring upon others, even of his own family, is too remote a consequence of the injury to be compensated for in damages.<sup>1</sup> But in an action against a physician, for an injury to the wife in delivering her of a child, damages may be given not only for the loss of time necessary to effect a cure, and the expense of employing another physician,<sup>2</sup> but also for the mental suffering of the wife produced by the destruction of the child.<sup>3</sup> The degree of mental suffering will vary greatly with the sex, age, and constitution of persons injured. Thus, the exposure of a lady to the eyes of a crowd, in disordered dress, may be very properly taken into account : whereas the same accident happening to a man would be of too little impor-

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<sup>1</sup> In an action brought by a woman against a railroad corporation for personal injuries, the death of her husband by the same cause, or the fact that she has children dependent upon her for support, is not admissible in evidence to increase the damages (*Shaw v. Boston & Worcester R. Co.*, 8 Gray, 45).

<sup>2</sup> *Leighton v. Sargent*, 11 Foster, 119.

<sup>3</sup> *Smith v. Overby*, 30 Geo. 241.

tance to be noticed. But the wealth of the defendant,<sup>1</sup> or the poverty or family distress of the plaintiff,<sup>2</sup> cannot be taken into account, nor directly or indirectly put in evidence.

§ 607. Pennsylvania enjoys the questionable distinction of having an exceptional rule on this subject. Her courts have inflexibly refused to relax the stringent rules of the common law for the protection of human life and safety; but her legislature has recently enacted that no damages shall be recovered against *railroad companies* for personal injuries, except such as have been "pecuniarily sustained," and then not to exceed \$3,000.<sup>3</sup> This statute is, by its terms, retrospective; but the Supreme Court of the state, with honorable firmness, has adjudged it to be unconstitutional, so far as it applies to injuries suffered before the passage of the act. It has become important to determine whether this statute limits the amount of damages which can be recovered in an action, brought in another state, upon injuries suffered while traveling on a railroad in Pennsylvania. It has been held in New York that it does not.<sup>4</sup> But the cases go to the Court of Appeals for final decision.<sup>5</sup>

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<sup>1</sup> In an action to recover damages for a personal injury, the damages are not to be estimated by, or proportioned to, the wealth of the defendant. Indirect proof of the defendant's wealth is just as inadmissible as direct proof, and for the same reasons (*Moody v. Osgood*, 50 Barb. 628).

<sup>2</sup> In an action to recover compensation for injuries done to the person of the plaintiff, by the negligence of the driver of a stage, which was thereby upset, the plaintiff cannot give in evidence, for the purpose of increasing the damages, that he has a wife and children (*Stockton v. Frey*, 4 Gill, 406; *Shaw v. Boston & Worcester R. Co.*, 8 Gray, 45).

<sup>3</sup> Stat. April 4, 1868. As to what are *pecuniary* damages, see *post*, § 612.

<sup>4</sup> *Dike v. Erie R. Co.*, Supreme Court, 2d dist.; *Floyd v. Erie R. Co.*, same court, 6th dist.

<sup>5</sup> The fact that the writer of this chapter is one of the counsel in these causes will, he hopes, excuse the absence of any expression of personal opinion on this point. An author's sphere is judicial; and he cannot well undertake to decide where he is counsel in the case.

§ 608. The damages recoverable by a parent, guardian, or master, for a negligent injury to the person of his child or servant, are strictly limited to an amount fully compensatory for the consequent loss of service, for a period not exceeding the minority of a child,<sup>1</sup> or the term of service of a servant, and the expenses which the plaintiff has incurred in consequence of the injury, such as for surgical attendance, nursing, and the like. These he is entitled to recover,<sup>2</sup> but no more,<sup>3</sup> unless the injury was occasioned by gross carelessness, under circumstances indicating that the person in fault was actuated by malice toward the *plaintiff*, rather than toward the injured child or servant. In such a case (which must, however, be rare) the plaintiff might recover exemplary damages, if the jury saw fit to award them. Damages awarded upon any other grounds than these clearly belong to the person corporally injured, whose right to sue, it must be remembered, is entirely unaffected by the action of his parent or master. If the latter should be allowed to recover for the pain and suffering of the servant, it would follow either that the servant could not recover himself for the same cause, or that the negligent

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<sup>1</sup> The recovery of a parent must be limited to this (*Traver v. Eighth Av. R. Co.*, 6 Abb. N. S. 46; 3 Keyes, 497). And he cannot recover for the loss of *future* service, unless that is specially pleaded (*Gilligan v. N. Y. & Harlem R. Co.*, 1 E. D. Smith, 453).

<sup>2</sup> In an action by a father against a railway company for injuries to his son, occasioned by his falling into a hole, across the company's track, and being thereby run over by the engine, which so crushed his leg that it required amputation, the rule of damages is compensation for the loss of services, for nursing, surgical and medical attendance (*Oakland R. Co. v. Fielding*, 48 Penn. St. 320). In this case the verdict was for \$1,800. Woodward, C. J., said: "If the jury exceeded, somewhat, the bounds of a sound discretion in assessing the damages, they erred through no fault of the court, and they are not within reach of our corrective power."

<sup>3</sup> *Gilligan v. N. Y. & Harlem R. Co.*, 1 E. D. Smith, 453. Where a father sues for injuries to his child, the injuries sustained by the child, such as his personal suffering, the loss of a limb, &c., would be the subject of an action by the child himself, and should not enter into the computation of the father's damages (*Pennsylvania R. Co. v. Kelly*, 31 Penn. St. 372). In *Fairchild v. California Stage Co.* (13 Cal. 599), however, the opposite conclusion was reached by the court.



person would be liable to pay twice the amount of damage which he had really done. Either alternative is contrary to justice and common sense.<sup>1</sup> So in regard to exemplary damages, where the malice, by reason of which they are allowed, was manifested toward the servant rather than the master. If, in such case, the injured person were not a servant, there could be no doubt of his right to recover the damages for his own use. Why should he lose this right by entering into service? And if he retains the right, how can it be just to require a double payment of such damages from the defendant?

§ 608 a. A more plausible claim may be advanced for the recovery of damages on account of the injured feelings of a parent. But when we consider that the whole foundation of the parent's right to recover for an injury to his child is in the relation of master and servant between them, and that he cannot recover upon any ground not common to him with all other masters, it appears unreasonable to allow the feelings to be taken into account in an action so purely business-like in its origin. It is true that in the action for seduction, which stands upon the same technical basis, the plaintiff's feelings are considered; but that action is always treated as an exception to the general rule.<sup>2</sup> In an action for mere negligence, there is no justification for allowing deviations from the principle upon which the action is founded. The parent of a minor child has no more right to recover for an injury to his feelings through negligence than the parent of an adult; and of course the latter cannot sue on that ground. The shock which may be given to the feelings of other persons than the one physically injured is, in fact, one of those elements

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<sup>1</sup> See *Whitney v. Hitchcock*, 4 Denio, 461; *Pennsylvania R. Co. v. Kelly*, 31 Penn. St. 372.

<sup>2</sup> See *Whitney v. Hitchcock*, 4 Denio, 461.

of damage which are too remote for the consideration of a court or jury in awarding compensation. The defendant is sufficiently punished by being compelled, as we have seen that he may be, to pay damages for the wounded feelings of the person physically injured.<sup>1</sup>

§ 609. An insurance against accident or death cannot be considered by way of reducing the damages recoverable by the injured person or his representatives, even though the amount insured be payable to the same persons as those to whom the damages are to be ultimately paid.<sup>2</sup> The fact of the insurance does not diminish the amount of pecuniary damage suffered by the defendant's fault, though it provides a method of compensation for it. Besides, the party effecting the insurance paid the full value of it; and there is no equity in the claim of the negligent person to the benefit of a contract for which he never gave any consideration. Even if the premium were charged to him, he would still have the unfair advantage of an option to take the benefit of a contract, *contingently* beneficial, after the contingency has happened. If any difference ought to be made under such circumstances, it is the insurer who ought to receive the benefit of the injured party's claim for damages; but this, also, is rightly settled to the contrary.

§ 610. The statutes of England, New York, New Jersey, Pennsylvania, Ohio, and Indiana, upon which the right of any person to recover damages in those states for the death of another exclusively depends, all provide for the assessment of damages "with reference to the *pecuniary*

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<sup>1</sup> See *ante*, § 606.

<sup>2</sup> In an action to recover damages for a death occasioned by the negligence of the defendant's servants, held, that the fact that the life of the deceased had been insured for the benefit of his widow should not be taken into consideration by the jury in assessing the damage (*Althorf v. Wolfe*, 22 N. Y. 355). *Campbell, C. J.*, ruled differently in *nisi prius* (*Hicks v. Newport &c. R. Co.*, cited in 4 Best & S. 403); but that decision has received no further sanction.

injury" sustained by the widow, next of kin, &c., of the deceased person. The courts have uniformly construed this language as restricting the damages recoverable in such an action to an amount which will fairly compensate the persons, for whose benefit the suit was brought, for their loss in a strictly pecuniary sense by the death of the injured person; or, in other words, that nothing can be allowed for in damages which is not of definite pecuniary value.<sup>1</sup> The sufferings of the deceased person from the injury,<sup>2</sup> and the grief and distress of his relatives,<sup>3</sup> cannot, therefore, be taken into account, nor yet their loss of his society, except so far as that implies the loss of valuable

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<sup>1</sup> This was first decided in *Blake v. Midland R. Co.* (18 Q. B. 93), and has been uniformly followed since (*Safford v. Drew*, 3 Duer, '627; *Lehman v. Brooklyn*, 29 Barb. 234; *Telfer v. Northern R. Co.*, 1 Vroom, 188; *Chicago v. Major*, 18 Ill. 349; *Chicago &c. R. Co. v. Morris*, 26 Ill. 400; *Pennsylvania R. Co. v. Henderson*, 51 Penn. St. 315). Under the act of 1855, the damages for which a railroad company is liable, if for any, in case of an injury to a minor son, resulting in death, are to be measured by the pecuniary value to the father of his services during his minority, together with expenses of care, attention, &c., during his illness (*Pennsylvania R. Co. v. Zebe*, 33 Penn. St. 318).

<sup>2</sup> *Lehman v. Brooklyn*, 29 Barb. 234. Nothing can be recovered as a *solatium* for wounded feelings, or by way of vindictive damages; and in such cases, it is the duty of the court to give definite instructions to the jury as to the true measure of damages (*Pennsylvania R. Co. v. Vandever*, 36 Penn. St. 298). In an action on the case by a widow against a railroad company, for an act of the defendant's agents, which resulted in causing the death of her husband, it was therefore held error to charge the jury as follows: "The question of damages is for you; should you find it necessary to examine that question let fair and exact justice be your guide, and your own good sense will determine it" (*Ib.*) So, in an action by the father for injuries to his child, it is error to instruct the jury "that there is no absolute measure of damages, and that they might give such damages as they believed to be right, to compensate the plaintiff for the loss and injury sustained" (*Pennsylvania R. Co. v. Kelly*, 31 Penn. St. 372. To same effect, *Penn. R. Co. v. Butler*, 57 Id. 335; *Penn. R. Co. v. Books*, Id. 339; *Chicago &c. R. Co. v. Swett*, 45 Ill. 197).

<sup>3</sup> *Chicago & Alton R. Co. v. Shannon*, 43 Ill. 338. In an action by a widow against a railroad company to recover damages for the killing of her infant son, alleged to have been caused by the negligence of an agent of the company, instructions to the jury, that, in estimating the damages, they may take into consideration the actual pecuniary loss to the plaintiff, occasioned by the death of the son and parent, and also such other circumstances as have injuriously affected the plaintiff in person, in peace of mind, and in happiness, are erroneous (*Ohio & Miss. R. Co. v. Tindall*, 13 Ind. 366).

service.<sup>1</sup> It follows, as a matter of course, that the plaintiff in an action of this kind cannot recover exemplary damages.<sup>2</sup> Unless the statute expressly names the husband, as well as the widow and next of kin of a deceased person, as one of those whose damage is to be considered, his loss cannot be allowed for in the damages recovered for his wife's death, since he is not, in a legal sense, of kin to her.<sup>3</sup> The same rule applies, of course, to a widow; but we know of no statute on this subject which does not expressly mention her.

### § 611. The statutes of Kentucky<sup>4</sup> and Connecticut<sup>5</sup> affix

<sup>1</sup> *Blake v. Midland R. Co.*, 18 Q. B. 93; see *Green v. Hudson River R. Co.*, 32 Barb. 25. In an action by a wife on the death of her husband, a motion was made for a commission to prove, amongst other things, that the deceased did not support his family, but that his wife allowed him £80 a year from her separate estate, and that he had lived on terms of improper intimacy with his servant. Held, that the evidence was admissible (*Brash v. Steele*, Hay, 90; 17 Jur. 267; 7 D. B. M. 539).

<sup>2</sup> See *Penn. R. Co. v. Ogier*, 35 Penn. St. 60; *Penn. R. Co. v. Vandever*, 36 Id. 298; *Penn. R. Co. v. Henderson*, 51 Id. 315; *Penn. R. Co. v. Books*, 57 Id. 339.

<sup>3</sup> *Dickins v. N. Y. Central R. Co.*, 23 N. Y. 158; *Green v. Hudson River R. Co.*, 32 Barb. 25. In the former case, Denio, J., said: "The section of the statute which relates to the subject declares that the amount to be recovered in this class of actions shall be for the 'exclusive benefit of the widow and next of kin' of the deceased, and the jury 'may give such damages as they shall deem a fair and just compensation not exceeding five thousand dollars, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of the deceased person.' (Laws of 1849, p. 388, § 1). It thus appears that the money to be recovered is not for the benefit of the estate generally, and that it does not become assets, to be administered according to the general law of distribution. And the ground upon which the damages are to be estimated, is not the detriment which the estate of the deceased has suffered from the wrongful act of the defendant in causing his death, but the pecuniary loss which certain parties connected with him by the ties of marriage and consanguinity have sustained on that account. It is the pecuniary injury resulting to the wife and next of kin which is to be estimated; but the injury to the husband, when it is the wife whose death has been caused by the defendant's act, is not spoken of as a ground of damages. And the husband is not embraced within the description of next of kin of his wife. Husband and wife, as such, are not of kin to each other in a legal sense." The benefit of the New York statute has since been extended to surviving husbands (Laws of 1870, ch. 78).

<sup>4</sup> In a suit by the personal representative of one killed by fault of a railroad company's agents against such company, the plaintiff may recover damages, as the person himself might have done for an injury where death did not ensue, and may, therefore, recover exemplary damages (*Bowler v. Lane*, 3 Metc. [Ky.] 311; *Chiles v. Drake*, 2 Id. 146).

<sup>5</sup> *Goodsell v. Hartford & New Haven R. Co.*, 33 Conn. 51; *Murphy v. N. Y. &*

no such limitation to the right of action for an injury causing death; and in those states the plaintiff may recover the same damages which the deceased might have recovered had the injury been just less than fatal. The jury may, therefore, take into account the sufferings of the deceased, and may, in an aggravated case, award exemplary damages.

§ 612. The pecuniary damage, which, as we have shown, can alone be recovered in most of the states for the death of any person, must be something of definite, and almost of commercial value. It is not necessary, however, to show that the deceased was under any legal obligation to the next of kin. If they had a reasonable expectation of pecuniary advantage from the continuance of his life, they may recover for it.<sup>1</sup> Thus, if he was in the habit of making them presents at regular intervals, this would constitute a valid basis for damages.<sup>2</sup> Much more are damages recoverable where the deceased was legally bound to render service to the next of kin, &c., as in the case of a minor child, whose services belong to his parents.<sup>3</sup> In New York, it is held that where the decedent left children, their loss of the parent's care in their education, as well as of his pecuniary support, may be taken into consideration, and this although

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New Haven R. Co., 29 Conn. 496; S. C. again, 30 Id. 184; Soule v. N. Y. & New Haven R. Co., 24 Id. 575.

<sup>1</sup> Dalton v. South Eastern R. Co., 4 C. B. [N. S.] 296; Franklin v. Southeastern R. Co., 3 Hurlst. & N. 211; Pym v. Great Northern R. Co., 4 Best & S. 396; affirming S. C., 2 Id. 149; Penn. R. Co. v. Bantom, 54 Penn. St. 495; see Dickens v. N. Y. Central R. Co., 1 Keyes, 23.

<sup>2</sup> In an action by a father to recover damages for the death of his son, it appeared that the son, who earned good wages, had been in the habit for several years of contributing to the support of his parents, who were in humble circumstances, by making them frequent small presents of groceries, and by becoming responsible for the supply of meat. Held, that damages might be given to the plaintiff in respect of his being disappointed in a reasonable expectation of pecuniary advantage by the continuance of his son's life (Dalton v. Southeastern R. Co., 4 C. B. [N. S.] 296).

<sup>3</sup> See Quin v. Moore, 15 N. Y. 432; Oldfield v. N. Y. & Harlem R. Co., 14 N. Y. 310.

one of the parents survives.<sup>1</sup> And the loss of a mother's care has been held a proper ground for damages in favor of a young child, as having not merely a moral value (which cannot be regarded in this action), but also an appreciable pecuniary worth.<sup>2</sup> In Pennsylvania, however, it is held that where a parent is killed, the damages must not exceed the amount which he would probably have expended upon the support and education of his children.<sup>3</sup> And if the next of kin were not dependent in any degree upon the deceased for support, or had no reasonable expectation of pecuniary benefit from him, only nominal damages can be recovered,<sup>4</sup> and not even these, in England.<sup>5</sup> Expenses which the next of kin, &c., become legally liable to meet, by the fact of the death of their injured relative, are recoverable; but not so with expenses which are not legally imposed upon them, however natural, usual, and proper. Thus, the funeral expenses of the deceased, and the cost of mourning dress for the family, are not allowable;<sup>6</sup> nor are any expenses incurred for the benefit of the deceased during his lifetime, even though made necessary by the injury from which he died, unless they would have constituted a debt from him if he had lived.<sup>7</sup>

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<sup>1</sup> In an action by a father, as administrator of his wife, who was killed by the negligence of the defendants, it is not improper for the judge to charge the jury that in estimating the pecuniary injury, they may take into consideration the nurture, instruction, and physical, moral, and intellectual training which the mother gave to the children. Such a charge does not imply that the children are necessarily and inevitably subjected to such a loss, but leaves it to the jury to determine whether any such loss has been in fact sustained, and, if so, the amount of the loss (*Tilley v. Hudson River R. Co.*, 29 N. Y. 252; *S. P.*, *McIntyre v. N. Y. Central R. Co.*, 37 N. Y. 287; 35 How. Pr. 38).

<sup>2</sup> *Tilley v. Hudson River R. Co.*, 29 N. Y. 252; and see *S. C.*, 24 N. Y. 471.

<sup>3</sup> *Pennsylvania R. Co. v. Butler*, 57 Penn. St. 335.

<sup>4</sup> *Chicago &c. R. Co. v. Swett*, 45 Ill. 197.

<sup>5</sup> *Ante*, § 299.

<sup>6</sup> *Dalton v. Southeastern R. Co.*, 4 C. B. [N. S.] 296.

<sup>7</sup> *Boulton v. Webster*, 13 Weekly Rep. 289.

§ 613. The jury are not confined to any mathematical calculation of the injuries sustained by the next of kin, &c., through the death of their relative.<sup>1</sup> They are to give what they deem to be a just compensation. Thus, where the next of kin received a fixed income from the deceased, the jury are not bound to give either as much or as little as the expectation of such an income would be worth, according to any annuity table.<sup>2</sup> A large discretion is left to the jury in such cases; and the court will interfere with their assessment of the damages only when this discretion has been clearly abused.<sup>3</sup>

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<sup>1</sup> *Chicago &c. R. Co. v. Swett*, 45 Ill. 197; *Chicago & Alton R. Co. v. Shannon* 43 Ill. 338.

<sup>2</sup> In an action by an executor or administrator against a party who, by his wrongful act, &c., caused the death of the testator or intestate, the damages are not to be estimated according to the value of deceased's life calculated by annuity tables, but the jury should give what they consider a fair compensation. The proper question for the jury in such cases is, whether the circumstances are such that if the deceased, instead of meeting his death, had only been wounded in consequence of the conduct of the defendant, he would have been entitled to damages for the injury (*Armsworth v. Southeastern R. Co.*, 11 Jur. 758).

<sup>3</sup> See *Oldfield v. N. Y. & Harlem R. Co.*, 14 N. Y. 310; *Pennsylvania R. Co. Ogier*, 35 Penn. St. 60; *Chicago v. Major*, 18 Ill. 349; *Chicago & Alton R. Co. v. Shannon*, 43 Ill. 338. In an action against a railway company for an injury sustained through carelessness of the company's servants, the plaintiff's injuries appearing to be very serious, and likely to be permanent, and he having lost an income of £150 a year, the jury gave £2,000; and the judge, not being judicially dissatisfied, the court sustained the verdict (*Britton v. So. Wales R. Co.*, 1 Fost. & F. 171). In an action by an administratrix for compensation for loss sustained in consequence of the death of the intestate, the question being whether there was negligence by the defendant, or contributory negligence by the deceased, the jury found a verdict for the plaintiff, damages 40s.—£1 for the widow, and 10s. for each of the children. The court granted a new trial, without saying any thing about costs, on the ground that the jury had shrunk from the duty of deciding the issue (*Springett v. Balls*, 6 Best & S. 477).





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